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REPORTS
OF
CASES IN BANKRUPTCY,
ARGUED AND DETERMINED
IN
THE COURT OF REVIEW,
AND ON
APPEAL BEFORE THE LORD CHANCELLOR.

BY EDWARD E. DEACON AND EDWARD CHITTY, ESQRS.
BARRISTERS AT LAW.

VOL. IV.

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CASES IN BANKRUPTCY

ARGUED AND DETERMINED

IN

The Court of Review, &c.

Ex parte BELCHER and others.—In the matter of
MABERLY.

1834.

Westminster,
June 2.

THIS was a petition of the assignees, praying for an Order of the Court to sanction an agreement, which was proposed to be entered into between the assignees and certain mortgagees of a mansion and estate of the bankrupt at Shirley, for the purpose of disposing of the property for the general benefit of the bankrupt's creditors; and the petition further prayed, that the mortgagees might have leave to bid at the sale. It appeared, that part of the estate, consisting of the house and 200 acres of land, had been mortgaged for the sum of 15,000*l.*, but that about 85 acres adjacent remained unincumbered. In August 1833, the assignees put up for sale this latter portion of the estate, but it was found to be so surrounded by the mortgaged property, and the boundaries to be so confused, that no person was inclined to purchase it, and the assignees had been therefore unable to dispose of it.

The Court will not make any order on the application of the assignees, as to the management for the sale of the bankrupt's property; they must act on their own responsibility.

Mr. *Swanston*, in support of the petition, said that it was now proposed, with the consent of the Court, to

1884.

Ex parte
BELCHER
and others.

allot the whole of the estate in such eligible portions as might be thought fit, for raising sufficient money to pay off the mortgage, and for the disposal of the unincumbered portion more favourably than could be done in its present inconvenient state. Lord *Eldon* frequently made similar orders, in the nature of an intimation to assignees, when any difficulty existed as to the best and proper course of acting for the benefit of the bankrupt's estate. If the Court, however, should not be inclined to accede at once to the wishes of the petitioners, it would perhaps direct an inquiry, whether or not such an agreement for the disposal of the property would be advantageous to the estate, and without prejudice to the other parties interested.

The COURT said, (Sir *J. Cross dissent.*), that there was nothing in the prayer of the petition which the assignees were not fully competent to do, without the authority and intervention of the Court, except so far as they asked for leave to bid at the proposed sale, which was a perfectly distinct matter, and might be applied for at any time. The mortgagees and assignees were well able to arrange the sale between themselves in such manner as would be most for their mutual benefit. The Court sits to adjudge, and not to act as counsel and advise; and it is due to the profession, not to anticipate any advice which might be sought for on an occasion of this description. Although Lord *Eldon* sometimes made such orders as have been alluded to, it was always done reluctantly, and with a declaration that the order should not be drawn into a precedent. The assignees have a discretionary power given them by the statute in the disposal of the bank-

rupt's property, and must act on their own responsibility; and the Court ought not, on an *ex parte* and unnecessary application, to interpose what might appear a sanction to the assignees, but which would in reality be no protection to them.

1834.

Ex parte
BELCHER
and others.

No Order made.

Ex parte ANN BROADBENT.—In the matter of JOHN ARTHUR BORRON.

Southampton
Buildings,
July 2 & 22.

THIS was the petition of an equitable mortgagee, praying for the usual order under the following circumstances:—

By indenture, dated 25th March 1829, one *William Lawton* demised to the bankrupt and four other persons, his partners, certain mines or seams of coal lying and being under the lands of the said *William Lawton*, at *Lawton*, in *Staffordshire*, to hold to them as tenants in common, for the term of thirty years at a certain rent. The mine was afterwards worked by the bankrupt and his partners, pursuant to the terms and conditions contained in their articles of co-partnership, one of which was—"That if any of the said parties thereto, or the representatives of any of them, should be desirous to sell and dispose of his or their share and interest in the said concern, the other parties interested in the said concern should have the option and preference of purchasing and having such share and interest, at such price or sum of money as should be

A. deposits with *B.*, as a security for the repayment of a loan of money, the attested copy of the lease of a coal mine granted to *A.* and four other persons, as tenants in common. The mine was worked by them according to the stipulations of certain articles of partnership, which contained a proviso that if any one partner wished to dispose of his share, the others should have a right of pre-emption: *Held*, (*Sir J. Cross dissent.*) that the usual order could not be made for the sale of *A.*'s share in this property, as in

the ordinary case of an equitable mortgage; it being necessary that the partnership accounts should first be taken, for the purpose of ascertaining the value of *A.*'s share in the property, which this Court had no jurisdiction to do, the other partners not being before the Court.

And *quære*, whether the deposit of the attested copy of a lease amounts to an equitable mortgage.

1834.

Ex parte
BROADBENT.

agreed upon between them and the party disposing of such share and interest."

On the 28th July 1829 the bankrupt borrowed of the petitioner the sum of 1200*l.*, to secure which he gave his bond, conditioned for the re-payment of that sum, with interest at 5*l.* per cent.; and also deposited with the petitioner an attested copy of the lease of the coal mine, accompanied with the following memorandum:—

"I do hereby acknowledge, that I have deposited with you an attested copy of a lease from *William Lawton, Esq.* to *James Sutton*, the *Rev. Henry Delves Broughton*, *John Arthur Borron*, *James Clifford*, and *Charles Adkins*, of certain coal mines in the counties of Stafford and Chester, which said lease is so deposited with you as a collateral security for further guaranteeing and securing to you the sum of 1200*l.*, which I have borrowed from you upon my bond, with all interest owing thereon. And I hereby declare, that the aforesaid lease so deposited shall, so long as the said 1200*l.* and interest be due and unpaid by me to you, give you full right and power to take and demand from my said partners in the aforesaid lease, so much of my proportion of the profits in said coal mines, together with my proportion of the stock of coals, cannel or slack, utensils, implements, or other property belonging to said company of lessees, as will at all times pay you the interest on the said loan or principal sum,"after being demanded according to the tenor of the aforesaid bond, whenever the same shall be behind and unpaid; and I hereby further agree and engage, whenever required so to do, to sign and execute a legal assignment of all my interest and property in the aforesaid coal

concern to you, so long as the aforesaid loan is unpaid.
Dated at Wooldon, in the county of Lancaster, this
1st day of May 1830.

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Ex parte
BROADBENT.

(Signed)

J. A. BORRON."

On the 9th January 1834, a fiat was issued against *John Arthur Borron*, under which he was duly declared a bankrupt. And on the 11th January the petitioner, by her attorney, gave a written notice to the other co-lessees of the mine, requiring that the bankrupt's interest in the colliery should be reserved and retained by them to satisfy the claims of the petitioner.

The petition prayed, that she might be declared equitable mortgagee of the hereditaments and other property comprised in the said agreement,—that an account might be taken of what was due to the petitioner for principal, interest, and costs,—that the Commissioners might direct the property to be sold,—and that the proceeds might be applied in the usual manner.

Mr. G. Richards appeared in support of the petition. As the bankrupt in this case was only one of several co-lessees, and had therefore no power to deposit the lease itself, his deposit of the attested copy of the lease was sufficient to create an equitable mortgage of his share or interest in the premises demised; and if it is a good deposit for the lands demised, it is also good for the rail-road, and all the fixtures and machinery, which have been erected by the co-lessees for the purpose of working the colliery. The case of *Ex parte Warner* (a) shews, that the deposit of the copies of the court rolls of a manor is sufficient to constitute an

(a) 1 Rose, 286.

1834.

Ex parte
BROADBENT.

equitable mortgage of copyhold property. [Sir G. Rose. Do you mean to contend, that the deposit of the mere copy of a lease will create an equitable mortgage, the same as if the lease itself was deposited?] There is no need to resort to the deposit, to establish a claim of lien to the bankrupt's share of the profits of the coal mine and the machinery; for the terms of the agreement are sufficient for that purpose. The working of the colliery was carried on by the other lessees, the bankrupt being a mere shareholder in the mine; and if any one was made acquainted with the fact of the deposit, there was no necessity of giving them formal notice of that fact; *Smith v. Smith* (a). But, according to the case of *Ex parte Kensington* (b), an equitable interest is not within the clause relating to order and disposition. [Sir G. Rose. We cannot make an order declaring the petitioner an equitable mortgagee of the bankrupt's share in this lease, without materially affecting the interests of the other partners, who are not now before the Court; for the effect of the order would be, that the partnership must be stopped, and the concern wound up, by taking an account forthwith of what is due to each partner in respect of his share. But if the bankrupt's share in this property belongs to his assignees, the joint adventure may go on until the state of the accounts can be more conveniently taken. The great difficulty, however, is—how can this Court take the accounts of a partnership?] The petitioner merely asks a declaration from the Court that she is equitable mortgagee; that will enable her to take the account, if necessary, either in this Court, or in some other. But, situated as she

(a) 4 Tyrw. 54.

(b) 2 Ves. & B. 79; 2 Rose, 138.

now is, she does not possess that right. [*Erskine*, C. J. The parties here, as I understand it, bind themselves by a partnership deed, that if any one chose to part with his share in the concern, the other partners should have the right of pre-emption. Can you come here to claim as equitable mortgagee, in a case where you could not have a specific performance?] We claim here not as against the partners, but as against the assignees. Supposing no interest in this property had passed to the petitioner; the assignees would then have been entitled to sell the bankrupt's share, giving the other partners the option of purchasing it.

1834.
Ex parte
BROADBENT.

Mr. *Swanston*, and Mr. *K. Parker*, for the assignees. The deposit of an attested copy of a lease can give no interest in the lease itself. That being the case, the petitioner must resort to the terms of the agreement of the deposit, and the articles of co-partnership between the bankrupt and the other parties interested in this lease. Now, it is sworn in the affidavit of the bankrupt, that it was provided by the articles of co-partnership between him and the other adventurers in this colliery, that if any one of the partners should be desirous to sell his share, the other partners should have the first option of purchasing it.

Mr. *Richards*, in reply. The petitioner could know nothing of what were the terms of the articles of co-partnership between these parties—all that she had to look to for her security were the terms of the lease, and of the agreement of deposit. We have never seen the articles of partnership; nor have they even been produced to the Court on the hearing of this petition.

1834.

Ex parte
BROADBENT.

But supposing there is such a clause in them, as is stated in the affidavit referred to by the other side,—if the bankrupt had before his bankruptcy wished to part with his share in this property, he would, of course, have first offered it to his partners. If there had been no contract between him and the petitioner, the assignees would in like manner have offered it to the other partners; and if they had refused to buy it, the assignees would then have had a right to sell it in open market. The only order sought by this petitioner is, that she may be allowed to do, what the assignees would have had a right to do. The other partners would not be damnified by such an order, although it is very true they are not now before the Court. We deny the position, that the petitioner could not have a decree for a specific performance in this case; for an agreement to execute an assignment amounts, in equity, to an actual assignment.

ERSKINE, C. J.—The way in which the case strikes me is this: The petitioner is a creditor of the bankrupt, having a security for her debt. If she had been a legal mortgagee of this property, she might have had it sold, without the necessity of coming to this Court; but as she is merely an equitable mortgagee, she is obliged to come here to make her security available. The petitioner has an agreement for an assignment of certain property, which, it is properly put, would in a Court of Equity amount to an assignment. But what is this assignment? If there is a deed by which the bankrupt undertook not to assign his share in this property, without giving his partners the pre-emption of it, he would have no right in the first instance, either at law

or in equity, to execute an assignment of it to another party; and therefore a Court of Equity could not carry into effect the agreement to assign. This case is very distinguishable from the ordinary one of joint-adventurers in a mine, in which a Court of Equity might compel the performance of an agreement entered into by one of the joint-adventurers to sell his share. But here it is sworn, that, independently of the lease to these parties as joint-adventurers, there is a deed of co-partnership between them, containing various provisions as to the working of the mine, and other matters collateral to their joint interest in the lease. I think, therefore, before we finally dispose of the case, that the Court should have an opportunity of inspecting this deed, and that the petitioner should also have time to answer the affidavit of the bankrupt which has referred to it.

1834.

 Ex parte
BROADBENT.

Sir J. CROSS.—A deed has been referred to by an affidavit put in by the respondents, for the purpose of defeating the petitioner's claim. We should certainly have this deed before the Court, and I am glad that the case stands over for that purpose. It is one of great importance to the parties, the debt claimed by the petitioner amounting to no less than 900*l*. The question is, whether the assignees, or the petitioner, are entitled to the bankrupt's share in this colliery? The assignees say, there is a *jus tertii* here, and we will hold the property as against you, the mortgagee, because that third party is not now before the Court. As at present advised, I cannot see that they have any such right. But, at all events, I think we ought not hastily to dismiss a petition on an objection coming

1834.

Ex parte
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from the Court, and that the case ought to be more fully argued.

Sir G. ROSE.—Upon the face of this petition, it appears to me, that we can make no order for the sale of this property. We cannot step out of our way to declare a party an equitable mortgagee, unless it is quite clear that he has a right to call for the interference of this Court. And I should say, without any reference to the articles of co-partnership between these parties, that in the absence of the other co-lessees, who are so materially interested in this property, we cannot declare the petitioner an equitable mortgagee, and order his share in the lease to be sold, to satisfy the claim of the petitioner, without first ascertaining whether it is subject to any, and what, claims of his co-lessees, who were his partners in the colliery. If there was merely a conjecture that there was such an interest in the other partners of the bankrupt, a Court of Equity would dismiss a bill filed for specific performance. But then it is sworn, that there is a partnership deed between these parties, in which it is provided that there shall be no assignment of the share of any partner, without the consent of the other partners. It is impossible, therefore, to declare that the petitioner is an equitable mortgagee of this property, in the teeth of that stipulation. It has been said, that an agreement for an assignment amounts to an assignment in fact in a Court of Equity. But though this is a Court of Equity, I must not forget that it is also a Court of Bankruptcy; and if there had been in this case an absolute assignment, instead of an agreement to assign, it might have amounted to an act of bankruptcy.

The case was then ordered to stand over till the 22d July, for the purpose of being more fully heard, and to enable the petitioner to answer the affidavit as to the partnership deed.

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Mr. *Richards* accordingly on this day stated to the July 22. Court, that the petitioner had now made an affidavit in answer to that of the bankrupt, in which she swore that she was entirely ignorant of the clause of pre-emption, of the partnership deed, or of any partnership subsisting between the bankrupt and the other parties; and that she would not have lent her money to him, if she had been aware of the bankrupt's interest in the colliery being subject to the right of pre-emption. [*Erskine*, C. J. The great difficulty you have to contend with is, whether the equitable mortgage can be supported, without taking an account of the partnership transactions, and seeing what interest the petitioner had in the partnership.] [Sir *G. Rose*. Are you furnished with any case, where it has been determined that the deposit of an attested copy of a lease gives an interest in the lease itself? I never heard of any. The lease here gives nothing but a chattel interest to the bankrupt. Can we, therefore, where there is nothing but a chattel interest granted by deed, say that the mere deposit of a copy of the deed will give any lien to the depositary?] I admit that the deposit of a mere copy of the lease would not have created a good equitable mortgage, if the bankrupt had been the sole lessee; because then there would have been no reason why the lease itself should not have been deposited. But here the bankrupt had only a fifth share in the demised property; and consequently his co-lessees, who

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were entitled to the other shares, had a right to the possession of the lease. [*Erskine*, C. J. You must take the interest granted by the lease as a chattel interest, for it is expressly granted for the purpose of enabling the co-lessees to carry on their partnership. The lease itself is not a lease of land, but of the mines and seams of coal under the land, for the purpose of being worked by the several persons to whom the lease is granted, which *ex vi termini* must mean a partnership. But I do not see what you can want with the deposit of a copy, as you have an express agreement in writing. If you had no written memorandum, then you might take it that the deposit of a copy was evidence of an agreement to deposit the lease itself.] That agreement gives the petitioner a right to demand from the bankrupt's partners so much of his proportion of the profits in the coal mines, as would be sufficient to pay the petitioner interest on the loan; and the bankrupt further engaged, whenever required, to execute a legal assignment of all his interest in the colliery to the petitioner for as long as the loan remained unpaid. Now, all that the petitioner seeks is to be put in the same situation, as the assignees would have been, if the bankrupt had not given to the petitioner this charge on his share in the colliery. The assignees would have become tenants in common with the other partners, and not co-partners with them, and would have been entitled to an account as to the value of the bankrupt's share in the concern. They would then, after offering the bankrupt's share to the other partners, and a refusal by them to purchase it, have had a right to go into the market and get the most they could for it. The petitioner is entitled to be declared equitable

mortgagee of this property, without previously taking the account. [*Erskine*, C. J. It is uncertain to what interest the bankrupt is entitled in this property, until the account is taken. He is not entitled to a fifth share of it, until all the partnership debts are paid; when he may not be entitled to one shilling, or he may be entitled to 1000*l*.] If the Court will only declare the petitioner to be beneficially interested in this property, she will have a right to an account afterwards. What injury would the order she asks on this petition cause to the bankrupt's estate? The estate will not be more injured by the petitioner dealing with the bankrupt's interest, than if the assignees had so dealt with it. [*Erskine*, C. J. Have you any case, where an order has been granted declaring an equitable lien on partnership property, before an account has been taken?] There is no authority in the books on this subject; but securities are often given on floating balances. [*Erskine*, C. J. Still, you must know what the balance is, before you can make the security available.] In this case, however, we have no right to inquire what is the amount of our interest, until the Court thinks proper to declare that we have an interest.

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Mr. *Swanston* and Mr. *Parker* for the assignees. The written agreement in this case puts beyond all doubt what the parties intended to be the subject of the lien; it is the bankrupt's proportion of the profits in a mining concern, that is, a trading partnership: and the taking an account of the shares of a partnership is not a subject within the jurisdiction of a Court of Bankruptcy. [Sir *J. Cross*. Although a partnership, it is not necessarily a *trading* partnership.] The argu-

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ment applies to any partnership, whether a trading one or not. The petitioner has no right to a vague and speculative declaration as to her having an interest in this property, nor will the Court make any such order, before the amount and value of that interest is distinctly ascertained. The very terms of the deed of co-partnership between the parties exclude the jurisdiction of this Court. Was it ever heard that this Court, with a limited jurisdiction, could make an order declaring a petitioner to be entitled to an interest in certain property, which was subject to the right of pre-emption by a third party, before any interest in it was conveyed to the petitioner, and when the rights of the third party are not brought before the Court?

Mr. *Richards* in reply. The right of pre-emption cannot affect the petitioner, who was entirely ignorant of its existence, and who is therefore a purchaser for valuable consideration without notice. With respect to the uncertainty of the bankrupt's interest, that is no objection to a declaration of the Court that the petitioner has a lien on it; for the moment her title is perfected, she can demand an account; but she cannot do this until her interest is declared. The order we seek will not interfere with the rights of third parties; we only ask what the bankrupt's assignees would have been entitled to, if this agreement had not been entered into. What is now uncertain can speedily be rendered certain, when we are in a situation to demand an account from the other partners. The trading concern here, as the other side have termed it, consisted in the occupation of real property, as tenants in common, for

the purpose of working a mine, which is very different from the ordinary case of a trading partnership. [Erskine, C.J. Is there any instance where a Court of Equity has directed a sale of partnership property, without previously taking the partnership account?] Upon an interlocutory motion in a suit between partners, a sale is frequently ordered, subject to the rights of the respective partners to be afterwards ascertained on taking the partnership account.

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ERSKINE, C.J.—This is an application that the petitioner may be declared an equitable mortgagee of the bankrupt's share in a certain colliery, demised to him and four other persons for the purpose of working and setting the coals to be obtained therefrom; that an account may be taken of what is due to the petitioner on her mortgage; and that the property may be sold, and the proceeds applied in the usual manner. If I thought that we could, consistently with the objects for which this Court was constituted, afford the petitioner the relief she now seeks, I should have been most anxious to do so, to prevent her from being driven to a more expensive tribunal. Nevertheless, if the Court has no power to interfere on this occasion, we must not let that consideration weigh with the strict line of our duty. The only parties before the Court on this occasion are the petitioner, and the bankrupt's assignees; and the other co-lessees, or co-partners, of the bankrupt in the colliery are strangers to the present proceeding. In general, a partner in a mining concern is considered more as a shareholder, than a partner, in the common acceptation of the term; and the bankruptcy is not in that case, as in others, a dissolution of the peculiar kind of partnership which

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exists between the shareholders. But the provisions of the partnership deed did in this case put the bankrupt in a different situation from that of a mere shareholder in a mine, and constituted him a partner in a mixed concern; and the proviso for pre-emption prevents that free transfer of his share, which would have been otherwise his right. But supposing that the bankrupt could, notwithstanding this clause for pre-emption, dispose of his share in the partnership property,—it would only be after ascertaining the amount of the debts of the partnership, that we could declare the petitioner, as equitable mortgagee, entitled to the bankrupt's share in the partnership assets. But then the difficulty which exists in this case is, the inability of this Court to take the partnership account. The present application is not for the sale of property to which the bankrupt was separately entitled, but for the sale of a coal mine to which he and four other persons were entitled as co-partners, and which must be considered as forming part of their partnership effects; for it is clearly settled, that whatever property, whether real or personal, is possessed and occupied for the purpose of carrying on a partnership, it is always treated as personal property in the distribution of assets. Now what is asked here by this petitioner? That we should declare him equitable mortgagee of the bankrupt's share in this property, and direct it to be sold. But we could only order a sale of the bankrupt's interest in the property, subject to an account to be taken in equity between him and the other partners, who are strangers to the present proceeding. This would, in effect, be putting up to sale what in its nature was not saleable, and burthen the estate more-

over with a suit in Chancery. But if we leave it to the assignees to take the account, and ascertain the value of the bankrupt's share in the property, it would be far better for the estate, and the petitioner's claim would still attach; for in refusing the prayer of this petition, we do not say that he has no interest in the property, nor that the transaction in question is not a valid equitable mortgage. But if we were to declare the petitioner an equitable mortgagee, that is a mere step to the ulterior proceeding of a sale of the property, which is always necessary to ascertain the amount of proof. As no authority has been cited in support of the present application, and as we should be doing injustice to the other parties by acceding to it, I think that we ought to dismiss this petition.

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Sir J. Cross.—This is a case of such importance, and involves interests of such great magnitude, that I am not prepared, without further consideration, to give my final judgment upon it. In point of fact, the bankrupt here has given the petitioner a lien on certain property, in which the bankrupt was entitled to a fifth share before his bankruptcy. Now the bankrupt's interest in this property belongs either to the petitioner, or the assignees under the bankruptcy; and I confess it does not at present strike me, that we are bound to ascertain what is the value of this interest, before we say to whom it belongs. I have listened with great attention to the arguments of the respondent's counsel, in order to remove any difficulties in my mind. The first objection to the prayer of the petition is, that this is a Court of limited jurisdiction. I do not agree in that position; for I think we have

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as much jurisdiction in dealing with matters properly brought under our cognizance, as any other Court of Law or Equity. Where we have jurisdiction over the subject-matter, it is full and ample for every purpose, and no more can be said of any other tribunal. It is next said, that there is no precedent for our interfering in a case of this description. If there is no precedent, we must look to principle. A case like the present is somewhat rare, of one partner engaged in working a coal-mine becoming bankrupt, while all the others continue solvent. It cannot be disputed, however, that the *bankrupt* here was entitled to a fifth share in this property; that the parties now disputing each other's claim to it are the *bankrupt's assignees*, and the petitioner; and that the petitioner is a *creditor claiming under the bankruptcy*. So much then for our limited jurisdiction.

Then it is said, that we cannot deal with this property in any way, before a partnership account is taken, and the value of the bankrupt's interest in it is precisely ascertained. But what is the ordinary practice of our dealing with equitable mortgages? Do we not order the property to be sold, when it is quite uncertain whether the party may not be selling a *damnosa hæreditas*? It is not incumbent on the Court first to proceed to settle the value of the thing in question, before it declares that a party has a lien upon it. In a case (a) recently before this Court, an order was made, declaring that the petitioner had a lien on the proceeds of a return cargo from the East Indies, without delaying such declaration until the value of the proceeds had been ascertained. Then why may we

(a) *Ex parte Prescott*, 3 Dea. & Chit. 218; 1 Mont. & Ayr. 316.

not in this case declare the petitioner to have a lien on the bankrupt's share in the colliery, without stopping to inquire what is the value of such share? But if it is absolutely necessary to ascertain the value, and if the assignees, as it has been said, will take the account for this purpose at their leisure, why not allow the case to stand over till that has been done? Or why may not an interlocutory order be made referring it to the Commissioners to ascertain the value, and let the case stand over for further directions? That might be done without any difficulty; for references to Commissioners to ascertain value are made every day. There is nothing therefore in the last objection, as to previously ascertaining the value.

It is then suggested, that the proposed order for sale would be destructive to the property in question, and would be injurious to the interests of the co-lessees. I deny that it would be so in the remotest degree. If indeed we were to send the petitioner in the dark to sell the property, without noticing the rights of the other co-lessees, then it might be said, with some reason, that we should be doing injustice. But if we declare the petitioner an equitable mortgagee, and direct a sale, not in defiance of it, but subject to the right of pre-emption of the bankrupt's co-lessees, the assignees might then unite with the petitioner in carrying this property into the market, and make as much of it as they could, in the same way as in any other case of the sale of an equitable mortgage.

It is next contended, that we cannot deal with this property so effectually as a Court of Equity could, where the other co-lessees would be necessarily parties litigant to the proceeding. In my opinion, there is no

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occasion to make them parties, for the purpose of doing justice to this petitioner. The petitioner disclaims any right whatever in opposition to their interests. Then, cannot we order the property to be first offered to them, in acknowledgment of their right of pre-emption? If they purchase it, we shall know how to apply the purchase money; if they decline, all difficulty is removed. If the assignees were entitled to this property, what would prevent them from dealing with it as they thought best? Then where is the difficulty, where the hardship, in allowing the petitioner to deal with it in like manner?

Again, it has been urged that this was a trading partnership, and that the agreement, being in effect an assignment of all the trader's property, was an act of bankruptcy, and invalid. But the fact, that it was the whole of his property, is a mere assumption; and were such really the fact, yet the working of a coal-mine is not a trading within the bankrupt act. Was it ever heard of, that one of several partners in trade could assign his share in the partnership to a third person? These parties were no more traders, than partners in a farm. They were tenants in common under the lease, occupying and working the mine for their joint benefit. One of the lessees however, it seems, was a trader, having been the subject of a commission of bankruptcy. What the nature of the trading was has not been disclosed to us; possibly, he was a trader under the truck system. If the agreement, therefore, at the time it was entered into by the bankrupt, gave the petitioner a valid interest in this property, I do not think the subsequent bankruptcy can possibly operate to his prejudice; for if, instead of the agreement, there had been an actual

assignment from the bankrupt, there is no doubt that the petitioner would have had a legal right against the assignees. It is said, that the assignees may intend to continue working this colliery in conjunction with the other lessees; but let them say so, if they mean it—they have not as yet declared such intent.

Upon a careful review of all the facts of this case, it appears to me, that though the deposit of a copy of the lease was not of itself an equitable mortgage, yet that the copy of the lease and the memorandum of agreement may be taken together, to explain the quality of the interest claimed by the petitioner. I therefore cannot perceive why the Court should not now, in accordance with the first part of the prayer of this petition, declare the petitioner an equitable mortgagee, reserving the rights of all persons not before the Court. The next thing prayed is, that an account may be taken of what is due to the petitioner for principal, interest, and costs; there can be no difficulty in granting an order for this purpose. The petitioner prays, lastly, that the property may be sold, not so as to deteriorate it in value, but for the purpose of making it available to the petitioner. Is it not reasonable that the assignees should join in rendering the property productive, in satisfaction or reduction of the claim of the petitioners? There would be no injustice, therefore, in acceding to this part of the prayer. From what I have already said, it may be easily gathered what the inclination of my opinion is upon this petition; but, in deference to my learned colleagues, I refrain from pronouncing any positive judgment in the case.

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Sir G. ROSE.—I retain the same opinion which I have

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already expressed, namely, that on the face of this petition the matter is not within the jurisdiction of this Court. In cases of mortgage, the jurisdiction is assumed, from principles of convenience, whether the mortgage be legal or equitable; and the Court can only interfere, when the case is perfectly free from doubt, as to the title of the mortgagee. The memorandum in this case amounts only to an agreement to give a stranger an interest in the partnership chattels; for a lease of land, for partnership purposes, is no more than a partnership chattel. I will not say, that a party cannot transfer such an interest; but I think we ought to hesitate much, before we determine that a trader can legally assign the whole of his interest in the partnership effects, without such assignment amounting to an act of bankruptcy. But this is not a Court to try that question; and as no authority has been cited for our doing what the petitioner requires, and it is a principle of Courts of Equity, not to extend the doctrine of equitable mortgages, I think we ought not to interfere in a case, where there is so much doubt as to our jurisdiction. If the lease itself had been deposited by the bankrupt, the petitioner might then perhaps retain it, and make the most she could of her possession; but as it is a mere deposit of an attested copy, and the intent of the deposit was to pass the whole of one partner's interest in the partnership chattels, the case presents so much difficulty to my mind, that I cannot think it is a fit question to be determined by a Court of Bankruptcy.

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Petition dismissed.

Ex parte PRESCOTT, GROTE, and Co.—In the matter of THOMPSON and MILDRED.

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*Southampton
Buildings,
July 3.*

THE petitioners in this case were parties to a former petition presented in this bankruptcy, and were holders of an acceptance of the bankrupts for 420*l.* 16*s.*, for which they had previously entered a claim, and which they now sought to prove, under the facts stated in the former petition, and by virtue of the order made thereon; for which see 3 Deac. & Ch. 218. After referring to the former petition and order, the present petition stated, that upon the former hearing the counsel for the assignees asked the Court to order that certain other bill-holders, who were parties to that petition, should relinquish the proofs which they had made for the full amount of the bills held by them, or at least refund their dividends upon such part of their debts as should be paid out of the proceeds of the shipping adventures mentioned in the former petition; which the Court refused to do. That the counsel for the petitioners suggested whether there should not be a direction added to the former order, providing that the petitioners should be at liberty to retain their proofs and claim mentioned in the former petition, undertaking to refund the surplus above 20*s.* in the pound; but the Court thought such direction was wholly unnecessary; and that the petitioners should be at liberty to retain their proofs and claim for their whole debt, undertaking to refund the surplus above 20*s.* in the pound, after the adventures should be wound up.

Where goods, in which the bankrupts were jointly interested with A. B., were pledged with a creditor to secure the payment of an acceptance of the bankrupts, and part of the proceeds were received by the creditor before he applied to prove: *Held*, that he must deduct the amount so received before he could prove on the acceptance. *Aliter*, if the goods had belonged to A. B. alone.

On the 17th March last the petitioners applied to the Commissioners to be permitted to turn their claim

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Peacock
and others.

into a proof, so as to entitle them to the dividends reserved on their claim; when the Commissioner, after taking some time to consider the matter, referred it to a Subdivision Court, which was held on the 6th May, and which also took time to consider their judgment until the 27th May; when they rejected the proof, on the ground that the petitioners were not entitled to prove the full amount of their debt, but only such part thereof as should not be paid by their share of the proceeds of the adventures mentioned in the former order. The petitioners now contended, that they were entitled to prove for the full amount of the bill they held, and to receive dividends thereon, undertaking to refund so much of the dividends received by them, as should exceed the sum of 20s. in the pound; and they prayed for an order of the Court accordingly.

Mr. *Montagu*, Mr. *Spence*, and Mr. *Heathfield*, appeared in support of the petition. The real question is, whether a joint creditor of two partners, having a joint security against them and a third partner, cannot prove against the estate of the two, without giving up his security against the three. It has been decided, that a joint creditor, having a separate security from one of his co-debtors, was entitled to prove his debt against the joint estate, without surrender or sale of his separate security; *Ex parte Peacock* (a). The petitioners were not bound to make any deduction from the sum of 420*l.* 16*s.*, the amount of the acceptance for which they applied to prove; as no part of the proceeds of the joint shipment of the bankrupt and *Evans* had been

(a) 2 G. & J. 27.

previously paid to the petitioners. [*Erskine*, C. J. There may be a question, whether the petitioners were not bound to deduct money lying in the hands of another person to the use of the petitioners, and which they might receive whenever they applied for it.] On the former hearing, Sir *G. Rose* in giving his judgment said (a), that the petitioners were entitled to the proceeds of the joint adventure as a pledge, without any direction as to election. [Sir *G. Rose*. The petitioners now come before the Court upon no question of election. The simple question is, whether their claim against the estate of the bankrupts is accompanied with the incidents of pledge, or of proof:—if of proof, there must be a deduction of the amount of their share of the proceeds,—if of pledge, then the question of election does not apply.] If the proceeds of the shipment had been merely the joint security of the two, then it is admitted that the proceeds must be realized, and the amount ascertained, before the proof could be received. If a creditor holds a security, which is given by the bankrupt alone, for the payment of his debt, he cannot prove his debt, without giving up his security; but this is not the case, where the creditor holds the security of a stranger, or the joint security of the bankrupt and a stranger.

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PRESKOTT
and others.

Mr. *Swanston*, and Mr. *Blackburne*, for the respondents, were stopped by the Court.

ERSKINE, C. J.—If the goods, which were the subject of the adventure, and which were pledged for the

(a) 3 Deac. & Ch. 230.

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Ex parte
Pascott
and others.

payment of the bills, belonged to *Evans* alone, then the petitioners in this case were not bound to deduct the amount of their share of the proceeds from their debt, before they applied to prove it under *Thompson* and *Mildred's* commission. But if *Thompson* and *Mildred* had any property in the goods, then the share of the petitioners in the proceeds must be deducted, of course, before they can be admitted to prove.

Sir G. ROSE.—If a creditor applies to prove on a bill of exchange against one of the parties to it, having previously received part of the amount from another party, he can only prove for the remainder. And here the petitioners have an equity against particular property, and have a right to work out that equity by the ordinary rules for the administration of assets in bankruptcy; the petitioners are, therefore, not entitled to prove for the whole amount of their debt; but the deduction from their proof will only go to the amount of *Thompson* and *Mildred's* interest in the goods, which can only be ascertained by taking an account. I think that the Commissioners have properly looked at the question, and that the order in this case should follow the order of *Ex parte Waring (a)*.

Petition dismissed. The assignees to have their costs out of the estate.

(a) 2 Rose, 182.

1884.

Ex parte JERVIS.—In the matter of ELLIOTT.

Southampton
Buildings,
July 3.

THIS was a petition to amend a fiat directed to Commissioners in the country, by altering the description of the petitioning creditors, so as to make it agree with that in the docket papers. The fiat was issued on the 26th June last, and was not yet opened. In making out the bond and affidavit, the solicitor had described the petitioning creditors as "*Thomas Hazelwood, of Withybrook, in the county of Warwick, farmer and grazier, and Thomas Turner, his partner;*" meaning thereby, that *Turner* was the partner of *Hazelwood* in this particular debt,—that is, that the debt was owing to them jointly,—and not that they were partners in fact. Owing to a misconception arising from this description in the docket papers, the petitioning creditors were described in the fiat, as "*Thomas Hazelwood and Thomas Turner of Withybrook, in the county of Warwick, farmers and graziers, and partners.*"

Fiat amended,
by altering the
description of
one of the peti-
tioning credi-
tors, so as to
make it agree
with that in the
docket papers.

Mr. *Swanston* appeared in support of the petition.

The COURT granted the order as prayed, though they thought the application might have been made by motion, instead of the more expensive mode of petition.

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Southampton
Buildings,
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Where it was sworn that an attorney had no place of residence in this country, an order nisi for his being struck off the roll was permitted to be served at his last place of residence.

In the matter of ROBERT MARK.

MR. MONTAGU moved for an order that *Robert Mark*, an attorney of this Court, might be struck off the rolls, he having been already struck off the rolls of the Court of Chancery, by an order of that Court. It did not appear, for what cause he had been struck off the rolls of that Court; but the application was made at the instance of the Incorporated Law Society, one of the objects of which society was, to keep a watch over the conduct and characters of attornies and solicitors. The motion was founded on an affidavit of the secretary of this society, which stated, that the deponent believed that *Mark* had now no residence in this country,—that a notice of this motion directed to him had been left with the landlord of the house which he had lately occupied,—and that the landlord informed the deponent, that the last he heard any thing about *Mark* was, that he was living at Boulogne.

ERSKINE, C. J.—The notice of a motion of this description should be served either personally on the party, or at his known place of abode. But as it is sworn that he has no place of residence in this country, you may take a rule for substituted service of the order nisi at his last place of residence.

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Ex parte TUFFNELL.—In the matter of WATTS.

1834.

Southampton
Buildings,
July 5.

THE bankrupt, who was the mortgagee of an estate for the term of 500 years, deposited with the petitioner the mortgage deed, for securing the sum of 800*l.* and interest, and afterwards purchased of the mortgagor the equity of redemption. There was no memorandum in writing accompanying the deposit of the deed. The petitioner prayed that he might be declared an equitable mortgagee, and for a sale, not of the mortgage term only, but also of the equity of redemption which had been purchased by the bankrupt; the petitioner undertaking to pay the costs incidental to the sale.

A bankrupt, having a mortgage term, deposits the mortgage deed with a party, by way of equitable mortgage, and afterwards purchases the equity of redemption: *Held*, that the whole of the bankrupt's interest in the property must be sold, and his assignees join in the conveyance to the purchaser.

Mr. *Beaumont*, in support of the petition. As the deposit of title-deeds is not a conveyance of the premises contained in them, but a transaction giving a lien for the full amount of the sum intended to be secured by the deposit; and the re-delivery of the deeds cannot be enforced until the whole sum is paid; the petitioner in this case is entitled to a sale of the whole of the bankrupt's interest, which comprised not only the mortgage, but also the equity of redemption subsequently purchased by him.

The COURT said, that it was sufficient to take the usual order for the sale of the property comprised in the mortgage security. The assignees have a right to a re-delivery of the mortgage deed, on satisfying the petitioner's lien; but if they do not adopt this course, there is no doubt that the whole of the bankrupt's interest in the property may be sold, and that the assignees must join in the conveyance to the purchaser.

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1834.

*Southampton
Buildings,
July 5.*

Ex parte DUNSTAN.—In the matter of DUNSTAN.

Special order as to the allowance of a bankrupt's certificate, where the signature of one of the creditors had been affixed to it under a power of attorney, and there was no affidavit of the execution of the power of attorney.

IN this case a creditor of the bankrupt, living at Cork, in Ireland, had given a power of attorney to a third person to sign the bankrupt's certificate, which had been signed by the attorney in pursuance of such power. When the certificate was lodged at the Bankrupt Office for allowance, it was discovered that there was no affidavit verifying the execution^(a) of the power of attorney; upon which the bankrupt's solicitor sent back the power of attorney to the creditor, accompanied with the form of the necessary affidavit, requesting him to get it sworn, and return the documents to London. The creditor, however, refused to take any further steps in the matter, unless 100*l.* was paid him, or a further dividend was declared of the bankrupt's estate. The bankrupt, therefore, now petitioned for an order on the creditor to deliver up the power of attorney and the affidavit, or that the certificate might pass without the signature of the creditor.

The creditor had been served with the petition, but did not appear.

Mr. Prendergast, in support of the petition.

The COURT ordered that the certificate should be received in the office, with leave to advertise it, but not

(a) By 6 *Geo. 4. c. 16. s. 124.* the Commissioners shall not sign any certificate, unless they shall have proof, by affidavit in writing, of the signature of the creditors thereto, or of any person thereto authorized by any creditor, and of the authority by which such person shall have so signed the same; and if any creditor reside abroad, the authority of such creditor shall be attested by a notary public, British minister or consul; and every such affidavit, authority, and attestation shall be laid before the Lord Chancellor, with the certificate, previous to the allowance thereof.

to go out of the office without the further order of the Court; that notice of this order should be given to the creditor; and that he might oppose the allowance of the certificate, if he thought fit, before the expiration of twenty-one days; and that at the end of the twenty-one days, the petitioner might be at liberty to apply again to the Court for his certificate; and that the petition should in the meantime stand over.

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DUNSTAN.

Ex parte HENRY CROWTHER.—In the matter of
WILLIAM CROWTHER.

Southampton
Buildings,
July 11.

THIS was the petition of a brother of the bankrupt for a supersedeas, under the following circumstances. The commission issued against the bankrupt in 1824; since which all the creditors had been paid in full, and consented to the supersedeas, except one who had proved a debt of 12*l.*, and whom the petitioner alleged he was unable to discover. The bankrupt himself was now living in Van Diemen's Land, but had duly surrendered, and passed his last examination, before he quitted England. He had forwarded to the petitioner a power of attorney, authorizing him to transact any business on his account in this country in any of the Courts of Law, but made no express mention of any application to this Court for a supersedeas. The petitioner now offered to pay into Court the full amount of the debt of the creditor, whose signature he had not been able to procure.

On a petition for a supersedeas, with consent of creditors, where one of the creditors could not be found, an order was made for the supersedeas, the petitioner undertaking to pay into Court the amount of the debt of the outstanding creditor.

Seemle, that a power of attorney to transact any business in the Courts of Law, authorizes the attorney to apply for a supersedeas.

Mr. *Swanston*, for the petitioner, submitted that the power of attorney was a sufficient authority to the

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petitioner to apply for a supersedeas, although that proceeding was not expressly specified in it.

The Court granted the order as prayed, the petitioner undertaking, both on his own behalf and that of the bankrupt, to confirm all sales which had taken place under the commission, and paying into Court the amount of the debt of the outstanding creditor, together with the expenses incidental to the application for the payment of such debt.

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Ex parte The NATIONAL BANK OF SCOTLAND.—In the
matter of JOHN MABERLY (a).

Southampton
Buildings,
July 22 & 23.

A. and B. have separate banking establishments in Scotland, where it is the custom of the different bankers to exchange the notes they hold of each other at stated periods; and A. and B. were accustomed to make such mutual exchanges accordingly. B. becomes bankrupt; when his agent, who conducted his business in Scotland, had in his possession notes of A.'s bank to the amount of 230*l.*, while A. had notes of B. to the amount of

THE petitioners in this case carried on business as bankers in Edinburgh, and at Montrose, and other places in Scotland, being incorporated by royal charter; and issued their own promissory notes payable to the bearer on demand in Scotland. It was the custom for the bankers in Edinburgh, and their several branch establishments in Scotland, to exchange at stated periods the promissory notes which they respectively held of each other, and pay the difference of such exchanges by an order upon their respective correspondents in London. The petitioners, in every week for some years past, regularly exchanged with *James Blyth*, the bankrupt's agent in Edinburgh, and with *William*

(a) The leading facts of this petition were similar to those of *Ex parte Cunningham*, reported *ante*, vol. iii. p. 58.

764*l.* B.'s agent refuses to exchange the notes for 230*l.*, claiming himself a lien on them; and B.'s assignees allow the agent to retain these notes, in satisfaction of such lien. *Held*, that A. was entitled to recover the value of the notes from the assignees of B.

Jamieson, his agent in Montrose, the bankrupt's notes which had been taken by the petitioners, for the notes of the petitioners taken respectively by *Blyth* and *Jamieson*; and were accustomed to give or receive cheques or orders on London for the payment of any residue. On the 4th January 1832, when *Blyth* received a communication from *Maberly* that he had stopped payment, *Blyth* had in his possession, as *Maberly's* agent, divers notes monies and effects of *Maberly*, amounting to 3925*l.* 6*s.* 6*d.*, including notes of the petitioners for 208*l.* 5*s.*; and *Blyth* subsequently received from the bankrupt's agents in Scotland other notes and monies of the bankrupt, amounting to 2577*l.* 0*s.* 7*d.*, including notes of the petitioners to the amount of 22*l.* 2*s.*; the two sums of 3925*l.* 6*s.* 6*d.* and 2577*l.* 0*s.* 7*d.* making together the sum of 6802*l.* 7*s.* 1*d.*

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On the 6th January 1832, the petitioners held notes of *Maberly* to the amount of 764*l.*; they therefore required *Blyth*, as *Maberly's* agent, to make the usual exchange of their respective notes; which *Blyth* refused to do, claiming himself a lien to the extent of 4424*l.* 12*s.* for his own advances on all the bankrupt's effects remaining in his hands.

In consequence of this refusal, the petitioners, on the 7th January 1832, applied to the Court of Session in Scotland, by bill of suspension and interdict, to prevent their notes in the hands of *Maberly*, and his several agents, from being negotiated to other persons; upon which the Lord Ordinary pronounced an interlocutor of that date, by way of interdict against *Maberly* and his agent *Blyth*, to prevent them from issuing any of the notes of the petitioners. And by another interlocutor of the same date the Lord Ordinary granted a

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warrant to the sheriff depute to take a special inventory of all the notes issued by the petitioners in the hands of *Maberly* or his agent, specifying their dates, numbers, and value, from the date of the last exchange; for the purpose of ascertaining, and to preserve the same for the behalf of all concerned; reserving entire to all parties their rights and interest in the notes. Such inventory having been accordingly taken, it was ascertained that the amount of the notes of the petitioners in the hands of *Blyth*, as agent for *Maberly*, was 208*l.* 5*s.*, and that the amount in the hands of *Maberly's* agent at Glasgow was 22*l.* 2*s.*

The petition then stated the various proceedings in the Scotch courts, as detailed in the former petition of *Ex parte Cunningham(a)*; and that *Blyth*, having been allowed by *Maberly's* assignees to retain 3925*l.* 6*s.* 6*d.* in part satisfaction of his claim of 4424*l.* 12*s.*, had paid over to the assignees the sum of 2877*l.* 0*s.* 7*d.* The petitioners were admitted to prove the sum of 198*l.*, for money had and received by the bankrupt's agent at Montrose, and also for 562*l.* 13*s.* the amount remaining due upon the bankrupt's notes in the hands of the petitioners, after deducting, by way of set-off, the sum of 230*l.* 7*s.*, as the amount of their notes in the possession of the bankrupt at the time of his bankruptcy. A claim was also admitted on the part of the petitioners for the 230*l.* 7*s.*, but without prejudice to their right to recover this sum from the assignees, or to any right of set-off against the assignees.

Upon an application made by the petitioners to the Commissioner respecting this claim, the Commissioner decided that the petitioners had such right of set-off;

(a) *Ante*, vol. iii, p. 60.

and they had since applied to the assignees for payment of the sum of 230*l.* 7*s.*, but they refused to pay this sum to the petitioners.

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The petitioners now prayed, that the assignees might be ordered to pay to them this sum, together with the costs of the petition.

Mr. *Swanston*, and Mr. *Montagu*, appeared in support of the petition. The sum claimed by the petitioners is the amount of the notes of the National Bank of Scotland, which were in the hands of the bankrupt at the time of his bankruptcy, and which have been available cash to the assignees. Suppose there had been no bankruptcy, and these notes had continued in the possession of *Maberly*, there is no question then that the petitioners would have had a right of set-off; for, according to the course of dealing between the parties, they were received upon an understanding that they might be regularly exchanged for the bankrupt's own notes in the possession of the petitioners. The same principle, on which the Court decided the former cases, must govern this.

Mr. *J. Russell*, and Mr. *Bethell*, for the respondents. It is impossible to confound the present case with the former cases in this bankruptcy; for the ground on which those cases were decided is wholly inapplicable to this. In *Ex parte Cunningham* the notes were sent to *Blyth* for a particular purpose, and as soon as he declined to perform that purpose, the right to retain the notes ceased, and he was legally bound to restore them on demand; *Buchanan v. Findley* (a). Unless the notes,

(a) 9 B. & C. 748.

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therefore, in this case, were paid into *Blyth's* hands for a special purpose, they became the property of the bankrupt, and he had a perfect right to deal with them as he chose, up to the period of his bankruptcy. In the former cases the Court said, that *Blyth* could have no greater right than the bankrupt himself could have; and there neither he, nor the bankrupt, had any right of property in the notes; as they were paid in for a special purpose. But that is not so here; for they were taken by *Maberly* at his counter in the ordinary way of business; they were received, not from the National Bank, but from other persons; the National Bank, therefore, can have no right to them whatever. As to the alleged contract of exchanging notes once a week, this was merely a custom for the mutual convenience of the parties, but was no qualification of the right of property, which every banker has in the notes in his possession. It appears, that the last weekly exchange of notes between the petitioners and *Blyth* took place on the 29th December, and that on the 6th January the plaintiff claimed another exchange of notes. But in the meantime another right had arisen from *Maberly's* insolvency. The act of bankruptcy was not committed by *Maberly* until the 26th January; and where is there any evidence that the bankrupt was compellable to give up these notes in exchange for others? On the 4th January, it is clear that the property in these notes was in *Maberly*, subject only to such interest as *Blyth* had in them by virtue of any lien. On the 4th January *Blyth* says, "*Maberly* is my debtor to the amount of 4424*l.* 12*s.*; I have only 3925*l.* 6*s.* 6*d.* of his effects in my hands, and therefore I will pay no one." He had a perfect right to retain this sum in satisfaction of his lien; and in the prosecution of this right he afterwards

obtains an interdict of the Court of Session; and on the 11th *February*, when the interlocutor decree is obtained, his right of retention to satisfy his own debt is recognized by the Court of Session, and he is only ordered to pay over the balance to the assignees. The notes now claimed by the petitioners formed part of those which *Blyth* retained in satisfaction of his lien; they are included in the sum of 3925*l.* 6*s.* 6*d.* remaining in the hands of *Blyth* on the 4th *January*. Now it is impossible, that *Blyth* can have a right to retain this sum, and the National Bank of Scotland a right to have it paid over to them. The assignees never received these notes, or their proceeds. If the petitioners, therefore, have any right to recover the value of them, *Blyth* alone is answerable to them, and not the assignees. The principle acted upon in the former cases was, that no property had passed to the bankrupt in the notes; but in this case the property in the notes vested in the bankrupt, he having given full value for them; and the whole property of the bankrupt in the hands of *Blyth* was swallowed up by *Blyth's* lien. Here there was never any possession of the notes by the assignees, and you cannot set up a constructive possession. A petitioner, to succeed in a case like this, must be able to support one of two actions—either an action of trover against the assignees for the specific property, or an action for money had and received to the use of the petitioner. But here neither of such actions could be maintained against the assignees; for as in the one case the property had passed from the petitioners, and the assignees had never the possession of it,—so, in the other case, the proceeds of the notes have never reached their hands. If there was ever any conversion of these notes, it was

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by *Blyth*, and not by the assignees. At all events, if the petitioners have any claim against the assignees, it can only be for such proportion of the money actually received by them from *Blyth*, as the proportion that the whole amount of their claims, namely, 230*l.* 7*s.*, bears to the whole sum originally claimed of *Blyth* by the assignees. This point was decided in the analogous case of *Huckey v. Young* (a).

But there is another difficulty in the Court making an order on this petition. The petitioners pray, that the assignees may be ordered to pay to them the sum of 230*l.* 7*s.* so received by the assignees. But the money has never reached this country, having been impounded in Scotland by the Scotch Court, which declared by its order of interlocutor, that all rights and claims of preference were to be discussed and determined under the proceedings in bankruptcy in England. Therefore, although this Court can declare the rights of the parties, it has no power over the fund, which is under the control of the Scotch Court. If the Court of Review makes the order as prayed, the assignees must pay out of the funds of the bankrupts' estates in this country; while the meaning of the order of the Court of Session is, that if this Court should decide the question of law in favour of the petitioners, they should go to Scotland to be paid their proportion of the fund which is there retained.

Mr. *Swanston* in reply. On the 4th January there were notes of the National Bank of Scotland in the hands of *Blyth*, as agent of *Maberly*, and in the hands of the Scotch Bank there were also notes of *Maberly* to a greater amount. This therefore raises a clear

(a) 1 Madd. 577.

case of set-off, or mutual credit. But in addition to this, there was a course of dealing by agreement between the parties, that there should be a periodical exchange of notes once a week. The 6th January was the last day before *Maberly's* bankruptcy, when the notes ought to have been exchanged. *Blyth* refuses to make the usual exchange; but advances then no claim, which he afterwards set up, of a lien on the notes due from *Maberly* to him. If the notes had been in the hands of *Maberly*, there can be no question that they were liable to a set-off in account with the National Bank. Then, as *Blyth* held the notes merely as *Maberly's* agent, they are of course subject to the same right of set-off. But at all events, if *Blyth* had any lien on *Maberly's* property, he could not have a greater lien on these notes than what *Maberly* himself possessed.

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ERSKINE, C. J.—In this case, if the simple fact had been that *Maberly* had at the time of his bankruptcy notes of the National Bank in his possession, and that the National Bank had in their possession notes of *Maberly*, there could then have been no doubt that the National Bank would have had a right of set-off. Or, if the assignees had taken possession of the notes, they would of course have been responsible to the National Bank for the amount. But it has been argued, in opposition to the claim of the National Bank: 1. that the notes were not in the hands of *Maberly* at the time of his bankruptcy; and 2dly, that they never came to the hands of his assignees. It is said, that *Blyth* having advanced money to his employer, on the terms of his having a lien on all notes and cash passing

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through his hands, had appropriated these notes in satisfaction of such lien. Now it is very important to ascertain when this was done; for if *Blyth* had actually appropriated these notes before the bankruptcy, that would be an answer to the claim of the National Bank. But there is no evidence of any appropriation of the notes by *Blyth* before the bankruptcy; for they were then still in his hands, with notice of the bankruptcy, and notice of the claims of the petitioners. The lien of *Blyth*, therefore, as between him and *Maberly*, cannot be said to have been paramount to the claim of the petitioners; for he could have no greater claim than what *Maberly* himself would have had. But the decision of this case does not rest on these general grounds. It appears that for a long time a regular course of dealing had existed between these two banks, of exchanging each other's notes, and that this course of dealing continued up to the period of *Maberly's* stopping payment. On the 6th January, when a demand was made by the petitioners to exchange these notes, *Blyth* does not refuse to do so, on the ground of any lien he then possessed; but his refusal was a general refusal to deliver up the notes: and it might possibly have proceeded on the ground of *Maberly's* bankruptcy. But that cannot alter the rights of the petitioners. The assignees then present their petition to the Court of Session in Scotland, claiming all the property in *Blyth's* hands, but expressly reserving all questions as to the rights of parties; and on that ground the Interlocutor of the Scotch Court was pronounced, which transferred to England the discussion of the rights and claims of the respective parties. By the subsequent arrangement made by the assignees

with *Blyth*,—when they allowed him to retain the sum of 3925*l.* 6*s.* 6*d.* in satisfaction of his lien, and received from him the difference between that sum and the amount of the notes and cash which he had then in his hands—they must be taken to have appropriated these notes to their own use; for they exercised the same dominion over them, as if they had paid them to *Blyth*, or received them into their own possession: their dealing with them in this manner amounted to a virtual conversion of them, which was the ground of the decision in *Ex parte Cunningham* (a), and *Ex parte Solomons* (b).

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Then it has been contended, that the assignees, if answerable at all, can only be answerable to a certain extent, that is, for a proportionate part of the sum allowed to be retained by *Blyth*; and the case of *Huckey v. Young* (c) was cited in support of that position. But that case was very different from this. There, the bankrupt's clerk having absconded with notes to the amount of 450*l.*, the assignees entered into a compromise with him, and received 100*l.* to release him entirely. In that case they received only part of the value of the notes which the clerk or agent had taken on account of the bankrupt; in this case the assignees received the whole; for in the settlement which they came to with *Blyth*, they took on themselves the disposal of the whole sum remaining in his hands at the time of *Maberly's* bankruptcy; and it was not necessary that they should actually receive the notes. In that case, also, there was no prior claim set up by a creditor, as there was in the present case. Here, therefore, the assignees have rendered them-

(a) *Ante*, iii. 58. (b) *Ante*, iii. 77. (c) 1 Madd. 577.

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selves liable for the whole amount, by treating these notes as the notes of *Maberly*; and this brings the case to a question of mutual credit, and, in my opinion, gives the petitioners a right to claim the amount of the notes from the assignees.

Sir J. CROSS.—I have often lamented in this Court the great difficulty of getting at the real facts of a case. It has been stated over and over again, that *Blyth* had a paramount right to these notes, by reason of his lien on any property of *Maberly's* in his hands; and the present case has been distinguished from the former cases solely on this ground. I should have been of opinion, that if *Blyth* had really such a lien on these notes, it would have extended to defeat the claim of the petitioners; for the circumstances of this case are distinguishable from those of the former cases (a), inasmuch as the notes in those cases never were the bankrupt's property. Here they were; that makes an essential difference. But I can discover in this case no such lien as has been asserted on the part of *Blyth*; if there was any, the respondents have at all events failed to prove it; for *Blyth* never exercised such a right, nor does it appear to me that he ever conceived he possessed it. Then how is the question in this case affected by the course of dealing between the parties? The case of *Huckey v. Young* (b) shews clearly, that the petitioners had a right to set off the amount of these notes in account between them and the assignees. The present case does not in any respect differ in principle from the former cases; and I think the petitioners are

(a) See *Ex parte Cunningham*, ante, iii. 58; *Ex parte Solomons*, ante, iii. 77.

(b) *Supra*.

entitled to recover the amount of these notes from the assignees, as so much money had and received by them to their use.

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Sir G. ROSE.—It is a great satisfaction to my mind, that the order we are able to make on this petition will be consistent with the abstract principles of justice; for it would be melancholy, if this trader, who was insolvent at the time he received these notes, could have been allowed to possess himself in this manner of the property of another man. The case of *Huckey v. Young (a)*, which has been cited in support of the argument on behalf of the respondents, certainly furnishes any thing but a principle for deciding this case in favour of the assignees; for all the help which that case affords them is, that if a creditor insists on the performance of any contract by which the bankrupt was bound, as against the assignees, the latter can never be held liable beyond the amount of assets that have come to their hands. The simple question here is nothing more nor less than one which calls for the plain answer of yes or no, and which might be put to a jury in an action of trover brought by the petitioners against the assignees. Were these notes the property of the National Bank of Scotland, or not? And have, or have not, the assignees converted them to their own use? The proceedings in the Scotch Courts were certainly not conclusive, as to the rights of the different parties; but it would appear from them, that the notes were considered *prima facie* the property of the National Bank. Have the assignees then committed any act of interference with this property, so as to amount to a conversion? The assignees say, that

(a) *Suprà*, 41.

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Blyth was the person who converted the property, and that if the petitioners have any claim, it can only be against him. If the case stood merely thus, that would have been a sufficient answer to the present claim. But the assignees have so dealt with this property in their settlement with *Blyth*, as to take upon themselves the responsibility of giving effect to an asserted lien of *Blyth*; and by the arrangement they made with him, the property, which was the subject of that arrangement, must, by operation of law, be considered as property in the hands of the assignees; and there is no doubt that the value of it could be recovered against them in an action of trover. It is true, that the assignees, having only obtained from *Blyth* the balance of what was in his hands after satisfying his lien, may say that they are hardly dealt with; but it would be much harder for innocent parties to suffer from the acts of the assignees. It must be understood, however, that the assignees are to be at liberty to make use of the names of the petitioners in any proceeding they may be advised to take against *Blyth*, for the purpose of reclaiming from him the amount of these notes. I think, that the petitioners are fully entitled to the prayer of their petition, and that it should be granted to them with costs.

ORDERED as prayed, and that the costs of both parties should come out of the estate.

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1834.

Ex parte WATSON.—In the matter of MABERLY.

Gray's Inn
Hall,
July 30.

THIS petition prayed that the assignees might be ordered to pay to the petitioner the sum of 629*l.*, being the amount of the notes paid by the petitioner to the bankrupt's agent in Scotland, for the purpose of being remitted to London. The facts were similar to those in *Ex parte Solomons* (a); except that the notes, which were paid in by the petitioner, were alleged to have been stolen by a clerk of *Blyth*, the bankrupt's agent at Edinburgh, and never to have formed any item in the accounts between *Blyth* and the assignees. The petition came first before the Court on the 5th June 1833, when the assignees having set up this matter as a defence to the claim of the petitioner, the petition was ordered to stand over, with liberty for the assignees to adduce evidence of the alleged robbery. They had, accordingly, filed two affidavits in corroboration of this statement; one made by *Pellatt*, the bankrupt's agent at Glasgow, and the other by *Douglas*, a clerk of *Blyth*.

The bankrupt had two agents, one at Glasgow, the other at Edinburgh. A. pays to the Glasgow agent a sum in bank notes, for the purpose of being remitted to London, which the Glasgow agent transmits for that purpose, in a parcel, to the Edinburgh agent, from whom the notes are stolen by his clerk the day after the parcel is delivered, and a few days before a fiat is issued against the bankrupt: Held, that A. had no claim to recover the value of the notes from the assignees.

Pellatt swore, that on the 4th January 1832, being the same day the notes were paid to him by the petitioner, he transmitted them, with others, in a parcel numbered 1861, and directed to *Blyth* at Edinburgh.

Douglas swore, that this parcel was duly received by *Blyth* at Edinburgh on the 5th January, and that it was stolen on the 6th January by a clerk of *Blyth's*, of the name of *Christal*, who immediately absconded with it; and that every endeavour had been since made to apprehend him, but without success.

(a) 3 Dea. & Ch. 77.

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Mr. *Bethell*, and Mr. *Paynter*, appeared in support of the petition. The petitioner obtained an interdict against *Blyth* in this case, as the petitioners had done in the former cases, to prevent him from putting away or disposing of these notes; and throughout the proceedings in the Scotch Courts, not a word is to be found in any statement on the part of the assignees, that these notes had been stolen, or that they never came to *Blyth's* hands. That fact was never brought forward in any way in the Court of Session; it must be inferred, therefore, that these notes were not in the parcel that was stolen.

Mr. *Swanston*, and Mr. *Montagu*, for the assignees, contended, that the affidavits of *Pellett* and *Douglas* were decisive of the fact that the notes were included in the parcel sent to *Blyth* from Glasgow, and that this parcel containing the notes was stolen the night after it reached Edinburgh.

Mr. *Bethell*, in reply, said, that *Pellatt's* present affidavit was not consistent with his former one made in the Court of Session, in which he merely stated that a sum of 1050*l.*, being the balance of monies remaining in his hands, which had been paid to him by the petitioner, was remitted by him to *Blyth* on the 4th January,—without saying, that the parcel contained the notes now claimed by the petitioner.

ERSKINE, C. J.—The petitioner in this case claims to have the notes delivered up by the assignees, which he states were lodged by him with *Pellatt*, one of the

bankrupt's agents at Glasgow, on the 4th January. The present case differs from all the others that have occurred in this bankruptcy, inasmuch as the notes in question never came to the hands of the assignees. If the petitioner could have shown, that at the time of the interposition of the assignees in the suit in the Scotch Court these notes were in the hands of *Blyth*, there would then have been no doubt that the petitioner would be entitled to the order as prayed. But the assignees have satisfactorily proved, that they were stolen long before that period, and that they never formed an item of the account between *Blyth* and the assignees. The petitioner asserts, that by an acknowledgment made by *Blyth* in the progress of the suit in Scotland, the notes must be taken to have been then in *Blyth's* hands. But how can *Blyth's* acknowledgment interfere with the fact? Whatever might have been the balance at that period in the hands of *Blyth*, it is clear, that these notes could not have been then in his possession, which were stolen on the 6th January. But it is then contended, that the notes were not included in the parcel sent by *Pellatt*, and that they remained in *Pellatt's* hands, contrary to the former statement of the petitioner, which expressly alleged them to have been in the hands of *Blyth*. It is, however, satisfactorily made out to my mind, that the notes were in the parcel sent to *Blyth* by *Pellatt*, and that the amount of the notes formed no part of the fund paid over by *Blyth* to the assignees.

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Watson.

Sir J. Cross.—The foundation of this petition is, that the notes in question, or their value, have come to the hands of the assignees. This was the main fact

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which the petitioner sought to maintain, when this case was formerly before the Court. Now the petitioner, by his counsel, says, I don't care whether that was so, or not; and then by artificial reasoning proceeds to argue, in defiance of the fact proved, that the notes, or their value, have really come to the hands of the assignees. Why did he not make his stand twelve months ago, and say that that fact was immaterial? The case resolves itself entirely into a question of fact; and I think that the assignees have clearly proved the negative of the fact, which was first asserted in support of this petition, namely, that neither the notes, nor their value, ever came to the possession of the assignees.

Sir G. ROSE concurred.

Petition dismissed, but without costs.

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Ex parte GEROTHWOHL.—In the matter of WERTHEIM.

April 27.

Where a fiat has not been filed, the Court, on an *ex parte* application of another creditor, will not order it to be annulled, but merely that the creditor may issue a new fiat.

THIS was a petition praying that a fiat already issued against the above bankrupt, on the petition of *Isaac* and *Michael Wertheim*, might be annulled, and that another might be issued in lieu of it, at the instance of the petitioner. The former fiat bore date the 5th April instant, but search having been made at the register's office up to the 14th instant, being nine days from the date of the fiat, it appeared that it had not been filed, according to the tenth general order of this Court of the 12th January 1832 (a).

(a) See printed Orders, 1 Dea. & Ch. xxv.

The petitioner stated himself to be a creditor for 100*l.* and upwards, and that he was ready to enter into the usual bond to the Chancellor, and undertook to prosecute the proposed new fiat for the benefit of himself and the other creditors of the bankrupt.

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Mr. *Swanston*, in support of the petition, stated that it had not been served on the parties who issued the former fiat; but he conceived the present to be, as of course, an *ex parte* application; for, as the fiat was not filed of record within the seven days limited by the general order, the proper construction of that order was, that the fiat became void and a mere nullity.

Sir G. ROSE.—Why do you not apply for liberty to take out another fiat simply? That is a matter of right, and it is all we can grant you in the absence of the former petitioning creditors. But that must, of course, be without prejudice to any right of those parties to proceed on the first fiat, and at your own peril. The construction of the order merely authorizes an application for leave to take out a new fiat. As to the propriety of superseding the former one, that question may be afterwards contested.

Mr. *Swanston* then moved for leave to take out a new fiat, which

The COURT ordered accordingly, the petitioner undertaking forthwith to proceed to the adjudication.

1834.

*Southampton
Buildings,
July 23.*

An uncertificated bankrupt cannot petition that his assignees may be ordered to account, without alleging that his estate will produce a surplus, after paying 20s. in the pound.

Ex parte RYLEY.—In the matter of RYLEY.

THIS was a petition of the bankrupt, praying that his assignees might be ordered to account for the proceeds of certain furniture and effects sold by them under the bankruptcy. It appeared, that the petitioner had been twice a bankrupt; that he obtained his certificate under the first commission in March 1832; and that the second commission issued against him in October 1832, under which he had not obtained his certificate. The petitioner charged the assignees with having fraudulently sold the effects to a brother-in-law of one of the assignees for less than a third of their real value, and that they were sold by private contract, instead of by public sale.

Mr. Phillimore, in support of the petition, said, that the object of the petitioner was to pay fifteen shillings in the pound under the present commission, which his estate was quite sufficient to pay, if it was not sacrificed by the assignees. It was very important to the bankrupt's interests that his estate should pay a dividend to that amount; for otherwise his certificate would only protect his person (a), and not any future effects which he might acquire.

ERSKINE, C. J.—The bankrupt does not allege in his petition, that the assets would be more than sufficient to pay his debts.

Sir G. ROSE.—The bankrupt, not having obtained

(a) See 6 Geo. 4. c. 16. s. 127.

his certificate, cannot support this petition for an account against his assignees, without alleging that there will be a surplus, after paying his creditors twenty shillings in the pound, whatever his right of action may be against them for the alleged sacrifice of his property. If the assets will pay twenty shillings in the pound, the petition may be amended, by inserting the necessary allegation to that effect; but if not, it is out of our jurisdiction to do any thing in this matter at present between the bankrupt and his assignees.

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Ex parte
RYLEY.

Sir J. Cross.—When assignees are charged with fraudulent conduct, I think this Court is bound to inquire into the truth of the allegation, whoever may happen to be the complainant; and I, for one, must say that I am unwilling to shut my ears to such a complaint.

The Court ordered the petition to stand over for eight days, with liberty for the bankrupt to amend; but no amendment having been then made, and the bankrupt neglecting to appear, it was, on the motion of

Mr. *Swanston*, and Mr. *Parker*, for the respondents,

ORDERED, that petition be dismissed with costs.

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*Southampton
Buildings,
July 3 & 23.*

Ex parte KIRKALDY.—In the matter of HOLT.

On an application by two creditors to the Commissioners to expunge a proof, under the 6 Geo. 4, c. 16. s. 60., the Commissioners have a discretionary power to adjudge to the creditor whose proof is sought to be expunged, such costs as he may think reasonable, including the costs of the meetings, as well as those of the creditor. And though the Commissioners may have allowed rather too much to the creditor, this will not make the order bad for the whole allowance, but the objecting parties may have the costs taxed.

A party is not entitled to an order on his petition, on the default of the respondent's appearance, if he is not prepared with an affidavit of the service of the petition, notwithstanding the respondent has given an undertaking to appear.

THIS was the petition of a creditor, who was also one of the assignees, for an order that he might be repaid the expenses he had incurred of resisting an application to the Commissioners to expunge the proof of his debt. It appeared, that the petitioner had proved a debt for 1200*l.*, and that two creditors of the names of *Calvert* and *Hume* had applied to the Commissioners to expunge it, upon entering into the undertaking required by the 6 Geo. 4. c. 16. s. 60(a). The Commissioners, after various meetings held to inquire into the validity of the debt, determined that the proof ought to stand, and ordered *Calvert* and *Hume* to repay the petitioner the costs which he had paid during

(a) The 60th section provides, "that whenever it shall appear to the assignees, or two or more creditors who have each proved debts to the amount of 20*l.* or upwards, that any debt proved under the commission is not justly due, either in whole or in part, such assignees or creditors may make representation thereof to the Commissioners; and it shall be lawful for the said Commissioners to summon before them, and examine upon oath, any person who shall have so proved as aforesaid, together with any person whose evidence may appear to the Commissioners to be material, either in support of or in opposition to any such debt; and if the said Commissioners, upon the evidence given on both sides, or (if the person, who shall have so proved as aforesaid, shall not attend to be examined, having been first duly summoned, or notice having been left at his last place of abode) upon the evidence adduced by such assignees or creditors as aforesaid, shall be of opinion that such debt is not due, either wholly or in part, the said Commissioners shall be at liberty to expunge the same, either wholly or in part, from the proceedings; provided that such assignees or creditors requiring such investigation shall, before it is instituted, sign an undertaking, to be filed with the proceedings, to pay such costs as the Commissioners shall adjudge to the creditor who has proved such debt as aforesaid, such costs to be recovered by petition; provided also, that such assignees or creditors may apply in the first instance, by petition, to the Lord Chancellor, or that either party may petition against the determination of the Commissioners."

the progress of the inquiry. These costs were as follows:

	£	s.	d.
Fees to Commissioners	4	0	0
Ditto for journey	2	0	0
Solicitor under the fiat for meeting	1	0	0
Ditto for journey	1	0	0
Fee to Commissioner	1	0	0
Room	0	10	6
Petitioner's solicitor	2	0	0
Messenger's bill	1	6	8
	12	17	2

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Calvert and *Hume* had been applied to for these costs, but refused to pay them.

The petition was set down in the paper for hearing on the 3d of July, and was then called on, when the respondents not appearing,

Mr. Purvis, in support of the petition, applied for an order as prayed, saying, that there was an undertaking on the part of the respondents to appear, although he was not prepared with an affidavit of the service of the petition.

ERSKINE, C. J.—That is not sufficient. The petition must be served on the respondents, before any undertaking to appear can operate.

The petition was set down again in the paper for July 23. this day, when

Mr. Swanston appeared for the respondents. All that the Commissioner is authorized to do by the

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statute is, to allow the costs of the creditor, and not the costs of the meetings. But he has here not only allowed the fees to the Commissioners, but also a fee of 1*l.* to the solicitor to the fiat, and another fee to him for his journey, as well as the messenger's bill. This the Commissioner had no right to do; and where one improper item is allowed in an order to pay costs, it makes the whole order nugatory. *Ex parte Thelwall* (a).

ERSKINE, C. J.—The case referred to merely goes to this extent—that the Lord Chancellor said he could not allow charges, which the act of parliament positively declared should not be paid out of a bankrupt's estate. Now there is no positive prohibition in the 60th section of the Bankrupt Act against the allowance of the 1*l.* to the solicitor, or of a reasonable sum for his travelling expenses; and the sums which have been *bonâ fide* paid by the creditor, whose proof is opposed, appear to me to come within the meaning of the statute, which gives the Commissioner a discretion to adjudge to the creditor such costs as he may think reasonable. The Commissioner has here adjudged 12*l.* 17*s.* 2*d.* to be paid to the creditor, to which no objection is made, until the creditor comes here to recover his costs by petition. If, indeed, the amount had been glaringly improper—as if the Commissioner had allowed a gross sum of 40*l.*, or had directed charges to be paid by the opposing creditors, which the act of parliament had said should not be paid—then the Court might have refused its sanction to the order of the Commissioner; but the Court cannot declare the whole order illegal, because

(a) 1 Rose, 397.

the Commissioner may have allowed 1*l.* too much, or too little. As the respondents, however, insist that some of the items ought not to have been allowed, the Court will make the order for payment, without prejudice to the taxation of the costs by the registrar, if the respondents should choose to have them taxed.

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Sir J. Cross.—The 60th section provides, that the assignees or creditors requiring an investigation into the validity of any proof, shall pay such costs as the Commissioners shall adjudge to the creditor who proved such debt, and that if either party is dissatisfied, he may petition against the determination of the Commissioners. There is here no petition impugning the judgment of the Commissioner; and the substance of the whole of this matter is, that the petitioner has paid these costs, and seeks now to have them refunded.

Sir G. Rose concurred, and asked the respondents' counsel, whether it would be worth their while to have the costs taxed, on the ground of the objectionable item of 1*l.*

Order made as prayed, with costs, without prejudice to the respondents' right of taxation.

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1834.

Ex parte BENJAMIN CLARKSON, Assignee of RICHARD MOORE, a Bankrupt.—In the matter of WILLIAM FEAR and HENRY COWARD, and in the matter of JAMES COWARD, and in the matter of RICHARD MOORE.

Gray's Inn Hall,
July 25.

A., B., and C., agree to dissolve their partnership, and that A. shall receive 550*l.* in discharge of his share in the concern, of which 50*l.* was agreed to be paid at the date of the agreement, and the remaining 500*l.* by five several bills payable at future dates. Separate fiats are subsequently issued against A., B., and C.; and the stock and effects, which originally belonged to the firm of the three, are taken possession of and sold by the assignee under the separate fiat against B. Held, that the agreement of the dissolution of the partnership was executed, and not executory; and that the joint creditors of A., B., and C., had no lien on such stock and effects for the payment of the debts owing to them at the time of A.'s retiring from the partnership.

THE first petition stated, that in August 1833, *Henry Coward, James Coward, and Richard Moore* were carrying on business together at Bath as linen-draper*s*, under the firm of *Cowards and Moore*. *Henry Coward* also carried on the business of an upholsterer at Bath, in co-partnership with *William Fear*, under the firm of *William Fear and Co*. Before February 1833, *Henry Coward* had withdrawn certain property from the partnership stock of *Cowards and Moore*, and had lent it to the firm of *William Fear and Co.*, whereby the latter firm became indebted to *Cowards and Moore*. In February 1833 *Cowards and Moore*, being unable to meet the demands of their creditors, applied to several of their creditors in London for an extension of time for payment, and offered to secure the payment of their debts by bills to be accepted by *William Fear and Co.*; which proposition being acceded to by the creditors, various bills so accepted were accordingly given to them by *Cowards and Moore*. Before these acceptances became due, the following agreement was entered into between *Moore* and his partners Messrs. *Coward*:—

“An agreement made and entered into the 10th day of August 1833, between *Richard Moore*, of Old

Bond Street, in the city of Bath, linen-draper, of the one part; and *Henry Coward* and *James Coward*, of Old Bond Street, in the said city, linen-drapers, of the other part. First, the said *Henry Coward*, *James Coward*, and *Richard Moore*, have this day mutually agreed to dissolve the partnership now subsisting between them, so far as regards the said *Richard Moore*, upon the terms following; that is to say, that the said *Richard Moore* shall receive, and they the said *Henry Coward* and *James Coward* shall pay unto the said *Richard Moore*, the full sum of 550*l.*, being the amount of capital brought into the concern by the said *Richard Moore*, and which sum is in full discharge of the said *Richard Moore's* share of the stock in the shop, and of all profits arising from the partnership concern, from its commencement. And it is agreed that the said sum of 550*l.* shall be paid in manner following; that is to say, the sum of 50*l.* shall be paid on the execution of this agreement, and the residue by five bills of exchange for 100*l.* each, to be drawn by the said *Richard Moore* upon and to be accepted by them, the said *Henry Coward* and *James Coward*, payable to the order of the said *Richard Moore*, at one, two, three, four, and five months after their respective dates. And the said *Richard Moore* hereby agrees to pay all his own private debts, except such as might have been contracted for house-keeping. And they, the said *Henry Coward* and *James Coward* do hereby agree to pay and discharge the debts which have been contracted for house-keeping, and also to pay and discharge all debts due from the firm. And it is further agreed, that the private debt due from the said *Richard Moore* to the

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firm, either for goods or cash, shall be extinguished, and the said *Richard Moore* discharged from the payment thereof, except such part of the account which has been charged to the said *Richard Moore* for goods, linen, furniture, or otherwise, supplied for the use of the house. And it is further agreed, that such goods, linen, furniture, and other articles, as have been supplied to the said *Richard Moore* for the use of the house, shall be considered the property of them the said *James Coward* and *Henry Coward*."

At the date of the above agreement, *Cowards* and *Moore* were jointly indebted to the petitioner, *Clarkson*, and his co-partners, in a considerable amount; and between February and August various other debts had been contracted by them and remained unpaid.

In pursuance of the agreement, notice of the dissolution of the partnership of *Cowards* and *Moore* was duly published in the London Gazette. On the 4th December 1833, a fiat was issued against *Fear* and *Henry Coward*; on the 10th December 1833, a separate fiat was issued against *James Coward*; and on the 27th February 1834, a separate fiat also issued against *Moore*. The first of these three fiats was opened and prosecuted in Bristol, and the other two in London. The stock and effects, which belonged originally to the firm of *Cowards* and *Moore*, were taken possession of by the petitioner, *George Gibson*, as official assignee under the fiat against *James Coward*, and had been since sold by him; and several debts due to *Cowards* and *Moore* had been also collected and received by *Mr. Gibson*, but others still remained unpaid.

The petition prayed, that the agreement of 10th August 1833 might be declared void, as against the joint creditors of *Cowards* and *Moore*; and that it might be declared also, that the whole of the stock, property, and effects, and all debts due and owing to the firm of *Cowards* and *Moore* on the 10th August 1833, constituted a joint estate of *Henry Coward*, *James Coward*, and *Richard Moore*; with a prayer for the usual accounts towards realization and distribution among joint creditors.

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Mr. *Ching*, and Mr. *Bacon*, in support of the petition, contended, that the agreement was void; but submitted that it was not necessary to go that length of argument; since, as the agreement was executory, and not executed at the time of the bankruptcy, it did not pass the property of the partnership out of the reach of the joint creditors.

Mr. *Swanston*, and Mr. *Bellamy*, for the respondents, the assignees of *James Coward*. We contend, that the agreement was executed from the moment the bills were given; their payment, or non-payment, having nothing to do with the stability of the contract. In *Ex parte Ruffin* (a), a partnership of two persons was dissolved fairly by the retirement of one of them, who assigned the partnership property to the continuing partner, and took a bond for the value, and a covenant of indemnity against the partnership debts. The other continued to trade separately for a year and a half, and then became bankrupt. Under these circumstances,

(a) 6 Ves. 119.

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Lord *Eldon* thought that the joint creditors had no equity attaching upon partnership effects remaining in specie, and that at all events such a claim ought to be advanced by bill, and not by petition in bankruptcy. And again in *Ex parte Williams* (a), it was determined by the same judge, who continued to hold the opinion which he had pronounced in the last case, that the right of the joint creditors in such a state of circumstances depended on the *bona fides* of the assignment. So in *Ex parte Wheeler* (b), where a retiring partner by agreement in writing assigned all the stock, debts &c. to the continuing partner, who agreed to pay the debts owing by the retiring partner, and also to pay him an annuity of 100*l.* per annum; for the due payment of which the agreement recited, that the father of the continuing partner (who was not a party thereto) *would be* security; it was held, that the agreement was only executory, and that, the father refusing to become security, the partnership stock was not thereby transferred to the continuing partner. This last case fully recognizes the principle laid down in the two preceding ones, and is therefore an authority in our favour; since in the agreement now before the Court, there is nothing to be found which was executory at the time of the bankruptcy. [Sir *J. Cross*. The question is, whether the memorandum of agreement did not convey the property in the partnership effects to the remaining partners absolutely and unconditionally.] That is certainly what we have to contend for. The period of the currency of the bills did not render the agreement executory. That was a mere

(a) 11 Ves. 3.

(b) Buck, 25.

mode of payment; and the punctuality, or want of punctuality, of such payment; was not to regulate the title of the parties. Suppose, as in the case of *Ex parte Wheeler* (a), an annuity had been the consideration for the assignment of the retiring partner's share; can it be said, after the decision in that case, that that mode of payment would have rendered the agreement not an executed agreement? Suppose, also, that one instalment of the annuity had not been paid, would such *ex post facto* breach of the agreement, in the absence of any stipulation to that effect, render that executory, which must previously have been taken to be executed and absolute? The principles, on which this case must be decided, are fully explained by Lord Eldon in the two cases already cited, of *Ex parte Ruffin*, and *Ex parte Williams*, shewing, that joint creditors have no equity against property which, though formerly belonging to their joint debtors, has been subsequently assigned to one only of such debtors, and placed in his order and disposition within the meaning of the statute of *James*. The only ground for this petition would be, to shew that the agreement in this case was fraudulent. But that ground they have abandoned, well knowing that it was perfectly *bonâ fide*. The case of *Ex parte Rowlandson* (b) is also an authority in favour of the respondents.

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Mr. Keene was proceeding to address the Court on behalf of *George Brettell*, the petitioning creditor, who had, under the fiat against *James Coward*, been served

(a) *Supra*.

(b) 2 Ves. & B. 172.

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with the petition ; but the Court said, that he had no right to be heard (a).

Mr. *Ching* in reply. [Sir *J. Cross*. Before you commence your reply, Mr. *Ching*, allow me to put this case to you :—Suppose that before the bankruptcy the last note payable by the agreement had remained unpaid, and that a creditor of the *Cowards* had taken in execution the property formerly belonging to the firm of *Cowards* and *Moore*—could *Moore*, on filing a bill for an injunction, have restrained the right of the creditor to proceed with his execution ; and would that right have been subject to the result of an account to be taken of the former partnership concerns ? In other words, would *Moore* have any lien remaining upon that specific property so taken in execution ?] I. certainly contend that he would. He gives up his share in the partnership effects, upon the terms of such and such things being done. The *Cowards* were trustees for the due performance of those terms ; one of which was, that the property conveyed to them should be applied to pay the partnership debts ; and, to enforce the performance of this agreement, *Moore* might certainly have filed a bill to obtain a specific appropriation of the funds for liquidating those partnership debts. The property assigned to Messrs. *Coward*

(a) *Seemle*, that the petitioning creditor in this case ought to have had his costs. In *Hall v. Kirby*, July, 1832, in the Exchequer, where a notice of a motion had been served on one of the defendants, who had become bankrupt, as well as his assignees, who had been made parties to the suit, Mr. *E. Chitty* was told by Lord *Lyndhurst*, that though he could not be heard, yet having been served, he was entitled to the costs of appearing.—*E. C.*

was clothed with a trust to pay the debts(a), and is liable to the equity of the retiring partners. The bills for 500*l.*, which by the agreement were given to *Moore* by Messrs. *Coward*, as a consideration for his relinquishing his share in the partnership effects, were never paid; and, therefore, the contract as to the dissolution of the partnership was never completed. If a transmutation of the partnership effects had been made to a stranger, instead of one of the partners, then it is admitted that there would have been no lien on the joint effects. But that is not the case before the Court.

Ex parte Wilson(b) was also cited in support of the petition.

ERSKINE, C.J.—This is a case amounting in effect to a claim by the creditors of the two *Cowards* and *Moore*, to have that property, which at one time belonged jointly to that firm, distributed in discharge of the debts owing by the firm. The answer set up to this claim is, that one of the partners, *Moore*, assigned and transferred the whole of his share in the partnership effects to the two *Cowards*, upon the dissolution of the partnership, so as to have passed all property in such share out of himself.

Now it is clear, that in conformity with the principles so intelligibly promulgated by Lord *Eldon* in the two cases of *Ex parte Ruffin*, and *Ex parte Williams*, the creditors of the three could have no lien upon this property, as of themselves; and that the only rights they could possibly have must be founded on such equity, as *Moore* himself would retain. It then be-

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(a) See *Ex parte Williams*, 11 Ves. 6.

(b) *Buck*, 49.

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comes a question, what equity *Moore* himself can claim as a charge upon that property. If the agreement entered into between *Moore* and Messrs. *Coward* had been merely executory, and had amounted to nothing more than a covenant, that if such and such things were done by them, he would then transfer to them his share in the joint effects—or, in other words, if the undertaking to pay the 550*l.* had been a condition precedent to any transfer of his share in the partnership property, then indeed *Moore*, and through him the joint creditors of *Cowards* and *Moore*, might have had some equity attaching on the property; because *Ex parte Wheeler* (a) has decided, that where an agreement to dissolve a partnership was merely executory, and not absolute, then even notice of the dissolution in the Gazette would not have the effect of transferring the share of the retiring partner, so as to bar him of his former interest in the partnership effects. But here it is contended, and I think properly so, that the agreement amounted to an absolute disposal of the effects by *Moore*. The only doubt which arises is caused by the paucity of language in the wording of the agreement, which, though in the future tense throughout, yet contains no condition or stated period of time in the performance of which, or on the expiration of which, its operation is made to depend. This obscurity is greatly increased in the last provisions of the agreement, viz. that “it is further agreed, that such goods, linen, furniture, and other articles, as have been supplied to the said *R. Moore* for the use of the house, shall be considered the property of them the said *James Coward* and

(a) Buck, 25.

Henry Coward." This, however, clearly gives the property in these particular articles to the two remaining partners. And from the absence of words to the contrary, as to the disposal of the rest of the partnership effects, we must assume this to be an absolute conveyance of such effects *eo instanti*. But, independent of this mode of construing the agreement, the fact of the actual dissolution of the partnership, the advertisement to that effect in the London Gazette, and the subsequent actual possession of the joint stock by the continuing partners, clearly indicate that the agreement was, as between the parties themselves, considered to be absolute. The fact of the 550*l.* being to be paid by bills at future dates, does not seem to me to render the agreement executory. These were nothing more nor less than a security, to which *Moore* trusted for the payment of the stipulated sum.

The effect of all these circumstances is, in my opinion, sufficient to create a complete transfer of *Moore's* share in the partnership effects; and, therefore, the joint creditors of *Cowards* and *Moore* have no equity through *Moore*, inasmuch as he has parted with all his rights and interest in the partnership fund.

Sir J. Cross.—This is a petition by the assignees of *Moore*, the retiring partner, praying the Court to declare the agreement of the dissolution of the co-partnership between himself and Messrs. *Coward* fraudulent and void, and thereby to render liable to the claims of the joint creditors of *Cowards* and *Moore*, that property, which the agreement purports to transfer to Messrs. *Coward*, the two continuing partners. Had

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the petitioner been able to substantiate the charge of fraud, that would certainly have been a ground, though the only one, to justify the interference of the Court on the present occasion. That charge, however, the petitioners have altogether abandoned. And we are now called on to say, whether the agreement did, or did not, transfer the property out of *Moore*.

It seems to me, that the transfer was properly and absolutely effected, and that the words used in the agreement are equivalent to these, namely, "that for and in consideration of the 50*l.* already paid, and bills given for 500*l.*, he, *Moore*, absolutely transferred all his share in the partnership property" to the Messrs. *Cowards*. It has been attempted to show, that the property so transferred was affected with a trust for the due and punctual payment of the bills, and of the joint debts then owing by the partnership. But I think neither of these trusts were in the contemplation of the parties when they dissolved their partnership. The 50*l.*, and the bills for 500*l.*, were at the time of the agreement considered fully equivalent to the value of the share of *Moore*, the retiring partner; and I therefore think that the transfer of the property was absolute, and that the joint creditors of *Cowards* and *Moore* have no interest in it whatever, in preference to the other creditors of Messrs. *Coward*.

Sir G. ROSE.—It has long been settled, that partners on the very eve of bankruptcy may assign their shares out of themselves effectually as against creditors; and in such case, where the assignment is without fraud, and not executory, the Court has no controlling juris-

diction over the property, though it has often struggled very hard to find circumstances which might operate to the benefit of creditors. It has also been long held, that it is perfectly immaterial whether the assignment take place by agreement, by deed, or by actual and corporeal handing over of the property. But the struggle of the Courts has always been, as I have just observed, to find some loop-hole for the benefit of creditors; and if the transfer were not in itself absolute, or if it wanted any of the formalities required by law or equity to render it valid, the Courts have readily laid hold of any of those circumstances to bring back the property into a just course of distribution among the general creditors, who would have been entitled to a lien on it, but for the attempted transfer.

In the case now before us, the question for us to consider is, was the agreement between these parties an executed agreement, or was it merely executory. And it is for us, after carefully looking into the agreement with the desire I have before alluded to, to say, whether any thing is left to be done so as to give to the agreement the character of an executory instrument. It certainly appears to me to amount to an absolute dissolution of the partnership; and the circumstance of the bills being agreed to be given for the 500*l.* is to be regarded as a mere mode of payment. If, as the petitioners have contended, upon any one of the bills not being duly paid, *Moore* could claim to be remitted to his former state, and have an account of the partnership dealings and transactions, and a right to a special appropriation of the joint effects to pay the dishonoured bill, then, no doubt, the creditors of *Cow-*

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ards and *Moore* would be justified in the claim they urge on this petition. But what is there in the agreement to give *Moore* any such right as that contended for? Nothing that I can discover. He simply takes the bills in payment for the remainder of the 550*l.*, and has the usual remedies by action in case of their dishonour, or in the event of bankruptcy by proof. With this mode of payment he was satisfied at the time of the agreement, and he has now no other right of relief on non-payment of the bills, than by action, or proof.

Had the property which was the subject of the agreement been real, instead of personal, how far that circumstance would have given *Moore* a lien upon it, it is not now necessary for us to determine^(a). But certain it is, that the bills which were taken by *Moore* in payment, give here no right to the specific appropriation of the goods assigned by him to Messrs. *Cowards* for the purpose of discharging such bills.

The petition was therefore dismissed.

(a) *Seemle*, that the lien in that case could be supported. See cases Chit. Eq. Index, title "Lien," III.



Ex parte RICHARD DOBSON.—In the matter of **JEREMIAH THOMPSON.**

1834.

Gray's Inn Hall,
July 28.

THIS was a petition of the sole assignee of the bankrupt's estate, praying that a certain ship, called the *Great Britain*, might be declared to constitute part of the bankrupt's estate; and that the respondents, Messrs. *Hicks* and Co., might be ordered to deliver it up, or account for its value; or that a claim for 24,000*l.*, which had been permitted to be entered on the proceedings on their behalf, should be disallowed.

The mere circumstance of a creditor coming in under the commission to prove or claim a debt, only gives the Court jurisdiction as to the proof or claim, and not over any property in his possession, of which he claims the legal ownership.

The facts were as follow:—The bankrupt for several years resided and carried on business to a considerable extent at New York, as a merchant and ship-owner; and was also engaged in partnership with his brother *William Thompson*, who resided in England, in the manufacture there of woollen cloths. For several years previous to his bankruptcy, the bankrupt had been in the habit of making large shipments of cotton from the United States, consigned by him ostensibly on his own account and risk, but secretly in partnership with his brother, to Messrs. *Rathbone* and Co. at Liverpool, for sale; the proceeds of which the bankrupt directed to be applied in payment of bills of exchange to be drawn by him on *Rathbone* and Co., and after payment of such bills, to be paid over to his brother. The bankrupt sustained heavy losses in his trade, and became largely indebted to various persons, and, among them, to *Hicks* and Co. On the 29th October 1827, he received information that *Rathbone* and Co. had refused to accept any more bills for him, and on the same day, and several days subsequent, various interviews took place upon the subject of his affairs between

Where a creditor applies to prove a debt, and claims a right to property in his possession, to which the Commissioners think he has no lien, the Commissioners should admit the proof, and leave the question of lien to be controlled merely by retention of the dividend.

On a petition by assignees disputing the right of a creditor to a lien on certain property of the bankrupt, the examination of the bankrupt's clerk taken by the Commissioners behind the creditor's back, is not receivable in evidence.

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him and certain of his creditors in New York, among whom was *Joseph Lawrence*, one of the partners in the firm of *Hicks and Co.* At these meetings the bankrupt communicated to his creditors the refusal of *Rathbone and Co.* to accept any more bills for him, in consequence of which he found it impracticable to carry on his business, and he, at the same time, made them acquainted with his insolvency. On the 30th October 1827, the bankrupt, with the knowledge and concurrence of his creditors at New York, stopped payment; and withdrew himself from his place of business in New York, and retired to his dwelling-house a short distance from the city, where he continued several days, which was contrary to his usual habits. It was then arranged, in order to protect these creditors, that the bankrupt should assign over all his different ships, and shares of ships, and other effects in the United States, in different shares, for the benefit of these creditors, to the exclusion of the bankrupt's other creditors; which arrangement was immediately carried into effect, by the bankrupt executing various assignments and bills of sale to them, and, among others, a bill of sale of a ship called the *Great Britain*, to *Hicks and Co.*, of which the bankrupt was sole owner; and of which *Hicks and Co.* shortly afterwards took possession. This ship was valued at 37,000*l.*, but was transferred to *Hicks and Co.* at the nominal price of 55,000*l.*, in part payment of so much of a confidential debt in respect of advances made to him, and of promissory notes given to them in exchange for others which they would be obliged to take up; but no money, or other consideration, passed between the parties upon the execution of the bill of sale.

The petition, after setting out various other assignments and transfers of the bankrupt's property, alleged, that all these creditors, to whom such assignments and transfers were made, well knew that the bankrupt was in such a state of pecuniary distress and difficulty, as to render it impossible for him to meet the demands of his various creditors, and that such assignments and transfers were made by the bankrupt with a view to give some of his creditors a fraudulent preference.

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The commission was issued on the 7th July 1828; and an application was made by *Hicks* and Co. to prove the balance of their debt, which the Commissioner refused, but permitted them to enter a claim on the proceedings for 24,544*l.* 6*s.* 9*d.*

Mr. *G. Richards*, and Mr. *Sharpe*, appeared in support of the commission. The question is, whether *Thompson*, before he executed the bill of sale, had not committed an act of bankruptcy, and whether the bill of sale is not of itself an act of bankruptcy, as being a fraudulent preference. [*Erskine*, C. J. If by the law of America the assignment of this property to *Hicks* and Co. would be a valid contract, then *Hicks* and Co., after deducting the value of the ship, could prove for the remainder of their debt, and for nothing more.] Keeping a claim on the proceedings to so large an amount, prevents any distribution of the bankrupt's effects. The claim is entered for the purpose of being ultimately converted into a proof, and receiving dividends; but as *Hicks* and Co. have property abroad in their hands, as security for their debt, they cannot prove under the commission without giving up the foreign security. By entering their claim on the pro-

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ceedings, they have brought themselves within the jurisdiction of this Court, and must elect whether they will give up their security, or come in under the commission as creditors for the whole of their debt. [Sir *G. Rose*. The Court cannot order the property to be delivered up by *Hicks* and Co., as prayed by this petition. All that we can do is, to order the dividends on the amount of the sum claimed to be paid into Court and invested in the Bank, until *Hicks* and Co. give up the property, or account for what they have received under the foreign security. If they keep the property and prove the whole amount of their debt, that may give the assignee a right of action against them; but it may turn out that they have a right to the property.

It was then proposed by the counsel in support of the petition, to read the examinations of the bankrupt's clerk and other persons, which had been taken by the Commissioners, and which related to the circumstances under which the bill of sale was executed by the bankrupt to *Hicks* and Co.

Mr. *Swanston*, for the respondents, objected to these examinations being received in evidence, as having been taken behind the back of the respondents.

Mr. *Richards*. We gave the other side notice that we should read them, and gave them copies of the examinations.

ERSKINE, C. J.—That will not make them evidence.

The COURT allowed the objection.

Mr. *Swanston*, and Mr. *Booth*, for the respondents. This Court has no jurisdiction over the property which was the subject of this transfer,—there is no question as to that,—for it is under the dominion of a foreign state. The first part of the prayer of the petition, therefore, which asks this Court to order it to be delivered up, is perfectly untenable. But the second part of the prayer is also irregular and informal; for the assignee has no right to apply to this Court to disallow a claim, unless an application had been previously made to the Commissioners for that purpose. If they had refused, he might then have appealed from their decision; but there is no suggestion of that kind in the petition. The petition also is irregular in setting out other assignments of property by the bankrupt, which have no relation whatever to the assignment in question. The petition, indeed, presents a perfect anomaly. It is well known, that dividends cannot be paid on a mere claim; and yet the petitioner prays that the claim in this case may be disallowed, *quia timet*, that dividends may be paid upon it. He cannot, however, come here to prevent a claim from being turned into a proof prospectively. [Sir *G. Rose*. Will you agree to submit to the jurisdiction, and bring the value of the property into Court, in order that the whole merits may be decided?] The respondents cannot be advised to do that; for the property is worth 37,000*l.*, and the sum for which a claim is entered is only 24,000*l.* The Court therefore, under these circumstances, cannot call upon the respondents to give the Court a jurisdiction over them which it does not possess, or to bring under its control a new subject of jurisdiction. Nor can the petitioner call on the Court to make an order to the prejudice of

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the respondents, on a matter over which it may have jurisdiction, because they refuse to submit to the jurisdiction of the Court in a matter, over which the Court has no jurisdiction. But we are prepared to go into the merits of the case, and contend that the respondents have a good and valid claim to the property which was the subject of the bill of sale. We have the certificate of Mr. *Griffin*, an American barrister, of what the law of the United States is, as to the effect of a bill of sale executed under the circumstances set forth in the petition; and he says, that the transfer would be held good in any Court of law or equity, and that no creditor of the bankrupt could, after such a transfer, have taken the ship in execution. The statement in the petition is, that the assignment of the ship was an act of bankruptcy; but this is not so by the law of America. The assignment in question was executed by the bankrupt in pursuance of a previous agreement entered into by him in the year 1826, by which he agreed to assign to *Hicks* and Co. his shares in three vessels, if certain notes were not paid. He makes default in the payment of these notes, and all that the respondents do, is to take an assignment of one ship only, instead of three.

Mr. *Richards*, in reply, was stopped by the Court.

ERSKINE, C. J.—I think, that an order should be made on the respondents to go in and perfect their claim into such proof, as they will be able to make before the Commissioners; and in default of their doing this, then that the claim should be expunged from the proceedings. If the respondents are permitted to

prove for any sum, then the amount of the dividends on such proof must be put into the Bank, until the other question as to the claim of property in the ship is determined. If the respondents had submitted to the jurisdiction of the Court as to that question of property, then we might have made a different order; but they have refused to submit this question to our decision, and have insisted that the petition should be dismissed with costs; and if the respondents had clearly made out their right to the property in the ship, I think they would have been entitled to such an order; for the petitioner cannot have the relief specifically prayed for by this petition; that is agreed. Because, though the transaction may be fraudulent, and it may amount to an act of bankruptcy, yet the mere circumstance of the respondents coming in to prove or claim under the commission, only gives the Court jurisdiction as to the proof or claim, and not over any property in their possession of which they claim the legal ownership. The next part of the prayer is, that the claim should be disallowed. But though the assignment of the property may be invalid, that will not invalidate the debt of the respondents. We could not therefore disallow the claim, or expunge the proof, if the claim had been converted into a proof; all that we can do is, to restrain the respondents from receiving any dividends, until they give up the property. It is said, that it is premature to order the dividends to be retained, when there has been no proof made by the respondents on which any dividend can be declared. Perhaps, in strictness, this may be so; but something must be done to enable the assignees to distribute the bankrupt's effects amongst

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his creditors. It will be for the respondents to show clearly, that they have no property of the bankrupt's in England. The circumstances of the case, I think, give rise to no presumption that the bill of sale of the ship was a fraudulent transfer, on the ground of its being an undue preference; for it appears to have been made in pursuance of a prior valid agreement. But we cannot say, whether, or no, there was any previous act of bankruptcy; and it is therefore doubtful, whether the legal property in the ship may not, by relation to the act of bankruptcy, have been vested in the assignees at the date of the execution of the bill of sale. If such should turn out to be the fact, the respondents would then have only an equitable claim to the ship, which they could not avail themselves of, till they had applied in the usual way for a sale and leave to prove for the difference, as in the ordinary case of an equitable mortgage. It is indeed by no means clear, that the assignee may not have a right to recover the legal possession of the ship, and should therefore have an opportunity of doing so, if he shall be advised. On the whole, however, the present inclination of my mind is, that the transaction in question was a *bonâ fide* transfer, and that the respondents will be finally entitled to their costs. The respondents may therefore go before the Commissioners, and make what proof they can, with liberty for either party to come again to this Court.

Sir J. CROSS.—It appears, that the respondents have made a claim under the commission for 24,000*l.* and upward, and that their debts would have been to a much larger amount, if it had not been for the pro-

ceeds arising from the sale of the ship. The assignee desires the Court to say that the bill of sale was fraudulent and void, and prays that the ship may be delivered up. This part of the prayer, however, they have given up, as the Court has no jurisdiction over the property in question. They then pray that the claim may be expunged; in answer to which the respondents contend, that we have no jurisdiction to expunge a claim, without previous application to the Commissioners for that purpose. I cannot say, that I am prepared to go that length; but it is unnecessary to decide that question upon this petition. The assignee then insists on the retention of the dividend on the amount of the claim, in respect of his right to the ship; for that the transfer being void, the property in it vested in the assignee under the commission. But they bring no evidence before us, to shew that the transfer was invalid; and the question of right to the ship, so far as the claim goes, appears to have been *sub judice* before the Commissioners; for they would otherwise have allowed a proof instead of a claim. The assignee then requires us to intercept the respondents in any further proceedings before the Commissioners, so that they may not be able to mature their claim into proof. But it would be contrary to all reason, that we should prohibit the Commissioner from allowing this to be done. The parties should go before the Commissioner, when all the questions raised this day may be fairly argued before him; and when the Commissioner shall have either admitted the claim to proof, or have rejected it altogether, it will then be the proper time for the party who is dissatisfied with the decision of the Commissioner, to come again to this

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Court. As two years have elapsed since the claim was made, it would seem, that the respondents have had sufficient time to turn their claim into a proof; but we cannot entirely reject the claim, on the ground of this delay. I concur, however, in the propriety of the suggestion, that unless the respondents shall substantiate their proof within a reasonable time, the claim ought to be rejected altogether.

Sir G. ROSE.—I apprehend the practice to be settled, where a creditor applies to prove a debt, and claims a right to property to which the Commissioners think he has no lien, that the Commissioners admit the proof, and leave the question to be controlled merely by retention of the dividend. This was settled by the case of *Ex parte Ackroyd(a)*, where the Commissioners had rejected the proof of a creditor, because he had received a portion of his debt, which the assignees contended he was bound to refund; but when the question came before Sir John Leach, as Vice-Chancellor, he decided that the proof of the debt was not to be rejected, because there was a question to be tried between the bankrupt's assignees and the creditor, although it was proper that no dividend should be paid on that proof, until the question was determined. In the present case, if the assignees had no ground whatever for opposing the proof, then their petition might have been at once dismissed with costs; but that point is not quite so clear. It is sufficient to say, that the debt is large enough to allow the assignees to challenge the right of the respondents to prove it. It would certainly have been more convenient, if the respondents had submitted the

(a) 1 Rose, 391.

question as to the right of property to the decision of the Court; but as they have not thought proper to do so, that question becomes a subject of adverse litigation before another tribunal, for this Court can make no order on the subject. But we cannot say, that because the respondents will not try that point here, the assignees shall not try it elsewhere. If the point had been submitted to our consideration, whether the subject-matter of the bill of sale was a chattel within the meaning of the Bankrupt Act, it would then have been incumbent on us to consider whether the domicile of the bankrupt was within the United States, and whether the bill of sale would have been fraudulent by the law of that country. The second question would be, how far, by the comity of the law of America, they would there give a priority of title to English assignees, notwithstanding the contract of transfer might be held to be good, according to the American law. The assignees ought not to be barred from contesting these questions, but the dividend must in the meantime be protected; and the payment of the dividend out of Court will hereafter settle the right of either party to the costs of this petition. It has been contended by the respondents, that the many similar assignments and transfers of property, which the bankrupt made to other persons in America, were improperly introduced into this petition, which relates to the single transfer of a particular ship. But if such numerous transfers of property are made by a trader in a foreign country, so as to amount in effect to a *cessio bonorum*, the assignees will be entitled to discuss the right of the respondents, after availing themselves of a *cessio bonorum* abroad, to come in here under an

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1834. English bankruptcy, for the purpose of receiving dividends. Nevertheless the Commissioner is not to reject the proof, because the property claimed by the assignees is in the hands of the respondents.

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The ORDER was, that any dividends declared, or to be declared, and retained, in respect of the claim of *Hicks Lawrence* and Co. standing upon the proceedings under the commission, should be from time to time carried by the assignee to his separate account with the bankers of the estate; that any such dividends should be retained in such account by the assignee, subject to further order; that the respondents should be at liberty to go in under the commission, and tender such amount of proof as they could establish in respect of their said claim; that such proof was not to be resisted, on the ground that the respondents had possession of the ship, called the *Great Britain*; and that the petitioner, as such assignee, should be at liberty to take such steps as he should be advised, to recover the possession of the property in question. And that all further directions and costs should be reserved, with liberty for any of the parties to apply.



Ex parte PHILLIPS and others.—In the matter of
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THIS was a petition of the bankrupt's representatives, praying that the assignees might be ordered to convey to the petitioners the surplus of the bankrupt's estate, without payment of interest to any creditors whose debts did not carry interest. The commission issued in May 1794; the bankrupt died in 1818; and all the debts, which were few and inconsiderable in amount, had long since been paid in full. Some of these were debts on bills of exchange and promissory notes, not bearing interest; and there had been a question raised, whether these creditors were not entitled to interest on their debts, before the surplus was conveyed to the petitioner.

The 132d section of the 6 Geo. 4. c. 16., which directs the payment of interest to creditors in case of a surplus, has not a retrospective operation.

Mr. Montagu, and Mr. Anderdon, were in support of the petition. The question is, whether the 132d section of the 6 Geo. 4. c. 16., which directs the payment of interest to creditors in the event of a surplus, be retrospective or not (a). In *Ex parte Shepard* (b),

(a) By 6 Geo. 4. c. 16. s. 132. "the assignees shall, upon request made to them by the bankrupt, declare to him how they have disposed of his real and personal estate, and pay the surplus, if any, to such bankrupt, his executors, administrators, or assigns; and every such bankrupt, after the creditors, who have proved under the commission, shall have been paid, shall be entitled to recover the remainder of the debts due to him; but the assignees shall not pay such surplus, until all creditors, who have proved under the commission, shall have received interest upon their debts, to be calculated and paid at the rate and in the order following; that is to say, all creditors whose debts are now by law entitled to carry interest, in the event of a surplus, shall first receive interest on such debts, at the rate of interest reserved or by law payable thereon, to be calculated from the date of the commission; and after such interest shall have been paid, all other creditors, who shall have proved under the commission, shall receive interest on their debts from the date of the commission at the rate of 4l. per centum."

(b) Mont. & M. 67.

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it was decided, that the clause was not retrospective; and in *Upton v. Bridges*, which came before the Lord Chancellor on the 18th February 1831, the decision in *Ex parte Shepard* was confirmed; and the same point was also decided in *Ex parte Sammon (a)*. The bankrupt's right would be materially affected, if the section were held to be retrospective; and by sect. 135 it is declared, that nothing contained in the act "shall affect or lessen any right, claim, demand, or remedy, which any person had under a commission then subsisting, except as was therein *specifically* enacted." Now, as there is no specific enactment that the 132d section shall operate retrospectively, it ought not to be construed so to operate, to the prejudice of the right of any person under a commission subsisting at the time the act was passed. This principle of construction is recognized in *Carew v. Edwards (b)*.

Mr. *James Russell* appeared for the representatives of *Sayer*, a simple contract creditor, who contended that they were entitled to interest at four per cent., although the debt itself did not carry interest. This case is distinguishable from *Ex parte Shepard (c)*; for the right of the bankrupt to the surplus had there become vested, before the act came into operation. The decision too in *Ex parte Ruck (d)* was founded on the same principle; for the grounds of Lord *Eldon's* judgment were, that the bankrupt's right to his allowance in that case became vested before the passing of the 6 Geo. 4. c. 16., and therefore that his allowance was to be regulated by the 5 Geo. 2. c. 30. s. 7., and not by the 6 Geo. 4. c. 16. It is of no importance, whether

(a) Mont. 253.

(b) 4 B. & Adol. 351.

(c) *Suprà*.

(d) Mont. & M. 297, note.

the commission issued before or after the new act; the material point for consideration is, the date of the dividend, which gives the bankrupt a right to his allowance, or to the surplus. It is a mere jargon in this case to talk of the prospective, or retrospective, effect of the act; the sole question being, whether the claim for interest arises under the old, or the new, law. If the bankrupt was now petitioning for his allowance, he would have a right to claim the increased allowance under the new statute; and on the same principle, the creditor here is entitled to the allowance of interest on his debt, which he was not entitled to under the former law. The words of the 132d section are express, that the assignees shall not pay the surplus to the bankrupt, until all his creditors, whose debts are not by law entitled to carry interest, shall receive interest from the date of the commission, at the rate of 4l. per cent. There are several other clauses of the new act—as, for instance, the 50th section relating to set-off and mutual debts—and the 120th section, imposing a penalty on persons concealing the bankrupt's effects—which apply to former commissions, as well as to those issued after the act. Why should not then the 132d section be construed to operate in the same way? The creditor's right to interest depends on the state of existing circumstances, under which he claims interest. The 135th section says, that the act is to be construed beneficially for creditors; and yet it is urged, in spite of this enactment, that the 132d section, which is framed for the peculiar benefit of creditors, is to be construed to their disadvantage. With respect to the case of *Ex parte Sammon (a)*, that was virtually an

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(a) 1 Mont. 253.

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appeal from *Ex parte Shepard* (a), which proceeded on the principle of looking to the time when the rights of the parties were completed. *Upton* and *Bridges* is not reported, and therefore the Court will not act upon that case as an authority. What is contended for on the present occasion is, that where the creditor's claim to interest accrues after the new act came into operation, it is to be regulated by that act, notwithstanding the commission may have been issued before the passing of the act. For it could never have been intended by the legislature, that there should be one code of law for commissions issued before the act of parliament, and another code of law for commissions issued since. [Sir J. Cross. You found your argument on the principle, that the bankrupt's right to the surplus did not accrue until after the final order of dividend. But what if the assignees had kept funds for several years in their hands, which would have been sufficient to pay all the creditors 20s. in the pound?] The bankrupt has always a right to call for the interference of the Court, to compel the assignees to distribute the fund among the creditors.

ERSKINE, C. J.—The case of *Upton* and *Bridges* was a petition of the bankrupt for his surplus, the commission having issued in 1814, and the final dividend not having been declared until 1828; so that the bankrupt's right to the surplus in that case did not become vested in him, until some time after the passing of the new act; and yet the Court said, that the creditors were not entitled to interest, and that the act had not in this instance a retrospective effect. I feel myself concluded by the cases which have been decided on

(a) *Suprà*.

the subject; although, if it had been an open question, I should have thought it worthy of some consideration.

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Sir J. CROSS.—Several cases have been cited in the argument, in which it is contended that a general rule of law has been laid down on this subject. I confess, that I should like to consider those cases, before I deliver a positive opinion on the construction of the act of parliament, as to the creditor's right to interest under the circumstances of the present case. There is an abstract question involved in this case, which ought not to be lost sight of. Can, or cannot, a surplus exist, previous to the making a final dividend?

Sir G. ROSE.—The question in this case depends upon the construction of the 132d section of the 6 Geo. 4. c. 16., coupled also with the construction of the last clause in the act of parliament, which declares that the act shall not take effect before the 1st day of September 1825. Taking these two sections together, therefore, it appears to me, that the 132d section was intended to have only a prospective effect as to commissions issued after the act came into operation. Now, under the former law the bankrupt was entitled to the surplus of his estate, after payment of interest only on those debts which by law were entitled to carry interest, and not subject to the payment of interest on those debts which did not bear interest.

ORDERED, that the representatives of the bankrupt were entitled to the surplus of his estate, without any deduction for interest on debts which did not carry interest; and that the costs of all parties should be paid out of the estate.

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Independently of the provisions in the acts of parliament, the Court of Review has a general jurisdiction to refer the bill of any solicitor of that Court for taxation.

Where the amount of a bill appears, on the face of it, to be excessive, objectionable items need not be pointed out, on an application by a creditor to have it taxed.

Ex parte COPELAND.—In the matter of **BURNAND.**

THIS was the petition of a creditor, praying that the solicitor's bill, for business done after the choice of assignees, might be referred to the Registrar to be taxed. The Commissioners had already taxed the bill under the provisions of the 6 *Geo. 4. c. 16. s. 14.*, at the sum of 1154*l.*

Mr. J. Russell, for the respondents, contended, that the Court had no power to make an order on this petition, either under the 1 & 2 *Will. 4. c. 56.*, or the 3 & 4 *Will. 4. c. 47.* By the first-mentioned statute, section 5, the costs of suit only between party and party in the Court of Review are directed to be taxed by a Master in Chancery; and by the last-mentioned statute, section 8, the Court of Review is only empowered to order any costs to be taxed by the Registrar, which by the 1 & 2 *Will. 4. c. 56.* are directed to be taxed by one of the Masters of the Court of Chancery. Now the costs, which are the subject of the present application, are not costs between party and party in the Court of Review. Besides, the rule is, that any creditor, who applies to have the solicitor's bill taxed, must shew a special case for taxation, by pointing out objectionable items.

ERSKINE, C J.—Independently of the specific provisions in the acts of parliament, this Court has a general jurisdiction over its own officers, and may therefore, in the exercise of its discretion, refer the bill of any solicitor of the Court for taxation. The large amount of the bill is quite a sufficient ground for our

ordering it to be taxed, without any objections being specified to particular items.

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Sir J. Cross.—The jurisdiction of the Lord Chancellor in bankruptcy being transferred to this Court, along with that jurisdiction comes the power of the Chancellor to order any bill of a solicitor of the Court to be referred to the proper officer for taxation. Now the Registrar, or Deputy-Registrar, is by the 3 & 4 Will. 4. c. 47. s. 8. declared to be the proper officer of this Court for that purpose.

Sir G. Rose concurred.

ORDERED as prayed.

Ex parte GEORGE PRICE WATKINS.—In the matter of
JOHN KIDDER.

Gray's Inn Hall,
July 30.

THE petitioner in this case claimed the beneficial interest in two shares in the Economic Assurance Company, standing in the name of the bankrupt in the books of the office; the object of the petition being, that the bankrupt might be ordered to transfer these shares to the petitioner. The following were the facts:—

By the rules of an Insurance Company, no person, except a director, was permitted to hold more than two shares in his own name; but no rule prevented a person from being beneficially entitled to more than two shares, by holding them in the name of another party. The petitioner, who was already the holder of two shares, having purchased two

In the year 1827 the petitioner became the holder, in his own name, of two shares in the stock of the Company; and being desirous to invest further money in the purchase of six other shares, he accordingly in June 1827, through the agency and assistance of

other shares, caused them to be entered in the name of the bankrupt in the Company's books, with the knowledge of one of the directors and the actuary. The bankrupt signed a declaration of trust, that he held the shares as trustee for the petitioner, but no notice of the trust was taken in the books of the Company; and he continued to receive the dividends on the shares, accounting for them from time to time to the petitioner, up to the period of his bankruptcy, when the shares were still standing in his name. Held, that the shares did not pass to his assignees, as being in his order and disposition at the time of his bankruptcy.

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Lancelot Baugh Allen, Esq., one of the directors of the Company, purchased six other shares numbered respectively 73, 128, 170, 171, 168, and 169, at the price of 250*l.* per share. By the rules and regulations of the Company, no person, except he be a director, is capable of holding more than two shares in his own name, unless by marriage, will, or administration. In case, therefore, any person is desirous to become the actual proprietor of more than two shares, the additional shares must be entered in the name of some other person in the books of the Company; but no rule or regulation of the Company prevents any one person from being beneficially entitled to more than two shares; and many shares are so held by the beneficial owners in the names of other persons as their trustees, or on their behalf. The petitioner, being informed by *Mr. Allen* of the rule and regulation above-mentioned, and of the mode in which it was necessary and usual that any shares beyond two, of which he might be the owner, must stand, requested the bankrupt, with whom he had been long personally acquainted, to allow two of the six additional shares to be entered in his name in the books of the Company; and also requested him to hold the same in trust for the petitioner. The bankrupt having acceded to this request, the petitioner accordingly caused two of the six shares so purchased by him, being those numbered 73 and 128, to be entered in the books of the Company in the name of the bankrupt; but the petitioner alone paid the whole price for these two shares. The petitioner alleged, that it was well known to *Mr. Allen*, as well as to *Mr. Naylor*, the then actuary of the Company, that such shares, though held by the bank-

rupt, were the property of the petitioner; and that immediately after they were entered in the books of the Company, the bankrupt duly made and executed, and delivered to the petitioner a declaration of the trusts thereof, bearing date the 12th June 1827, which was as follows:—

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“I, *John Kidder*, of the Strand, in the county of Middlesex, silversmith, do hereby declare, that the two shares numbered —, standing in my name in the Economic Assurance Office, were purchased and paid for by *George Price Watkins*, of Broadway, in the county of Carmarthen, Esquire, with his own monies, and for his own sole benefit; and that my name is only made use of in trust for him, his executors, administrators, and assigns. And I do hereby engage to assign the said shares to him, or to whom he shall appoint, at his expense, whensoever required. Dated the 12th day of June 1827. *John Kidder*.”

It appeared, that the bankrupt duly received the dividends on the two shares from time to time as they accrued due, and thereupon regularly accounted for or paid over the same to the petitioner; and that the bankrupt acted in all respects, according to the direction of the petitioner, in his character of nominal proprietor of the two shares.

On the 3d March 1834, the fiat was issued against the bankrupt; and his assignees claimed to be entitled to these two shares, as being in his order and disposition at the time of his bankruptcy; giving notice of their claim to the directors of the Company; and refusing to allow the shares to be assigned to the petitioner.

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The petition prayed, that the two shares, standing in the books of the Company in the name of the bankrupt, might be ordered to be transferred by him to the petitioner, or to such person as the petitioner should direct, and that the assignees might be compelled to join in such transfer; and that in the meantime the assignees might be directed to pay to the petitioner all the dividends, interest, or produce thereof respectively, which should accrue due thereon until such transfer; and that they might be also directed to pay to the petitioner all the dividends, interest, and produce, if any, which had accrued due on the shares since the bankruptcy of *Kidder*, and which had been received by the assignees.

In answer to the allegations of the petition, the solicitor to the assignees made an affidavit, that he applied to the resident director of the Economic Assurance Office, for the purpose of ascertaining the circumstances under which the transfer was made, and was informed by him as follows:—That *Kidder's* name was entered in the books, and that he was actually treated and considered on all occasions as the real and *bonâ fide* owner, and that no other person was recognized or known to the Company to have any control or right of ownership in the shares. That the Company never received any notice or information that *Kidder* held the shares on account of the petitioner, or otherwise than as the actual owner of them. That *Kidder* received all dividends and gave his own receipts, and that all notices and letters were sent to him, and that he possessed and could have exercised all acts of ownership in respect of such shares, and he attended meetings of the shareholders and voted as such; and that the peti-

tioner might have received the dividends under a power of attorney.

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The official assignee also swore that the certificates of the two shares, which were made out in the name of *Kidder*, were in his possession at the time of his bankruptcy; and that he had been informed and believed, that such certificates were the only evidence of title to such shares.

Mr. *Swanston*, and Mr. *Romilly*, were in support of the petition. The real and beneficial ownership of these two shares is beyond all question. The single point is, how far the shares appeared to be the property of the bankrupt. Now it is expressly provided by the 6 Geo. 4. c. 16. s. 79., "that if any bankrupt shall, as trustee, be seised, possessed of, or entitled to, either alone or jointly, any real or personal estate, or any interest secured upon or arising out of the same, or shall have standing in his name as trustee, either alone or jointly, any government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, it shall be lawful for the Lord Chancellor, on the petition of the person or persons entitled in possession to the receipt of the rents, issues and profits, dividends, interest and produce thereof, on due notice given to all other persons (if any) interested therein, to order the assignees, and all persons whose act or consent thereto is necessary, to convey, assign, or transfer the said estate, interest, stock, funds, or annuities, to such person or persons as the Lord Chancellor shall think fit, upon the same trusts as the said estate, interest, stock, funds, or annuities were subject to before the bankruptcy, or such

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of them as shall be then subsisting and capable of taking effect, and also to receive and pay over the rents, issues, and profits, dividends, interest, or produce thereof, as the Lord Chancellor shall direct." This case, therefore, is plainly within the terms of that section. It is not necessary, that the trust should be incorporated with the title to the property. For instance, a sum of trust stock in the public funds appears, by the books kept at the bank, to be the property of the person in whose name it stands; for nothing is mentioned in the books of any *cestui que trust*. In a case which recently occurred in this Court, in the matter of *Remington and Stevenson's* (a) bankruptcy, the Court ordered a large sum of stock, that was standing in *Stevenson's* name at the time of his bankruptcy, to be transferred to new trustees appointed by the *cestui que trusts*, as a matter of course. In the present case, however, there was actual notice to the Insurance Company; that the shares were the property of the petitioner; for Mr. *Allen*, one of the directors, and Mr. *Naylor*, the actuary of the Company, were well acquainted with that fact.

Mr. *Montagu*, for the assignees. By one of the rules for the government of this Company it is expressly stipulated, that no proprietor, unless he is a director, shall be permitted to hold more than two shares. It is very important, that the Court should not lose sight of that fact. Then, is it to be contended, in the very teeth of this regulation, that one man may hold all the shares of the Company for his own benefit, provided he holds them only in the names of other per-

(a) 3 Deac. & Ch. 24. And see *Ex parte Hancox*, Mont. 247.

sons? Such a consequence as this would lead to great fraud and deception. Where a man is trading in his own name, it ought at least to be known to all the world, that he is merely trading as a trustee. In this case it was never properly notified to the Company, that the bankrupt was a mere trustee of these shares; for it is sworn, that he voted on all questions relating to the affairs of the Company, as a proprietor in his own right, and regularly received notice of all meetings as such proprietor. [Sir J. Cross. The words of the 79th section certainly are, "if any bankrupt shall have standing in his name, *as trustee*," any stock, &c.] Here the shares stood in the bankrupt's name, *not as trustee*, but as his own, and the trust was secret. The shares so held by him, therefore, must be taken to have been in his reputed ownership at the time of his bankruptcy, according to the doctrine laid down in all the cases; *Ex parte Monro* (a), *Dearle v. Hall*, and *Lovridge v. Cooper* (b). In *Nelson v. The London Assurance Company* (c), where one of the directors of the Company assigned his salary and share to the Company, to secure a private debt which he owed them, and empowered the Company to sell the same for payment of such debt, but became bankrupt before any such order was made, it was held, that the share was within his order and disposition at the time of his bankruptcy, and passed to his assignees. That case makes strongly against the present petition, because there is no doubt that all the Company had there notice of the assignment of the share. So in *Ex parte The Lancaster Canal Company* (d), it was held, that where an act of parliament

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(a) Buck, 300.

(b) 3 Russ. 1.

(c) 2 Sim. & St. 292.

(d) 1 Deac. & Ch. 411.

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prescribed certain forms in the transfer of the shares of a Company, and those forms were not strictly complied with, the shares remained in the order and disposition of the bankrupt proprietor. The present case is not like that of *Ex parte Straight* (a), where notice of the assignment of two policies of assurance was expressly sent in a letter to the secretary of the Insurance Office. For here the petition merely states that it was well known to Mr. *Allen* and Mr. *Naylor*, that the shares were the property of the petitioner; without alleging that any formal notice of that fact was given to the Company. And in answer to this general allegation in the petition, the solicitor to the assignees swears, that he was informed at the office that no notice was ever given to the Company. A mere conversation as to the transfer of the shares will not amount to notice, where there was no express intention to give such notice; as was lately decided in a case before this Court relating to the *Rock Life Insurance Company* (b). [Sir G. *Rose*. Is notice in this case of any consequence, now that the act of parliament (c) has put the stock of any public company upon the same footing as stock in the government funds? You can find no authority, which says that notice is essential in the case of a trust.] Is it to be held, then, that a man, without a shilling of his own, is to be permitted to appear to the world the owner of valuable property, because there is some secret understanding between him and the real owner, that he is not the true proprietor? [Sir J. *Cross*. There may be a difference, where A., being the owner of

(a) Mont. 502; 2 Deac. & Ch. 314.

(b) See *Ex parte Carbis*, 1 Mont. & A. 693, note.

(c) 6 Geo. 4. c. 16. s. 79.

shares, creates the trust in *B.*, reserving to himself the beneficial ownership—and where *A.* makes *B.* a trustee for *C.*, a third person. Could an order be made for the transfer of these shares, within the terms of the 80th section of the Bankrupt Act, which relates to any stock “standing in the bankrupt’s name in *his own right?*”] [*Erskine*, C. J. Is not the present case like that of a factor, or a coach-maker, where it is not to be taken for granted that the possessor of the property is the real owner of it; but those who deal with a trader, under these circumstances, are bound to make some inquiries as to the real ownership of the property in his possession?] Where property is held by a bankrupt under the limitations of a will or marriage settlement, as a trustee for children, there the property is not held by the bankrupt with the consent of the true owner. But here the petitioner, being the sole proprietor of these shares, says to the bankrupt, “will you hold them for me, as apparent owner, as I do not wish to be considered the real owner.” This is a fraud on the Insurance Company, as well as on the rest of the world. In *Joy v. Campbell*(a), where *T.* held shares in a trading company in trust for *W.*, who by his will appointed *T.* his residuary legatee, and *T.* continued in possession of the shares, and became bankrupt; it was held by Lord *Redesdale*, that *T.* was the true owner and proprietor of the shares, though subject to the debts and legacies of *W.* Where the rules of a society are, that no more than two shares shall be held in one name, the truth ought to appear, if one man holds any share as a mere trustee; and it ought to be declared by some document in the possession of the society,

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(a) 1 Sch. & Lef. 328.

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that the party does not hold the shares for himself, but in trust for some other proprietor. As to what has been called a declaration of trust in this case, it is merely a private agreement between the possessor of the shares and the owner of them, that the possessor is not the proprietor.

Mr. *Swanston*, in reply, was stopped by the Court.

ERSKINE, C. J., after detailing the facts of the case, proceeded as follows:—The petitioner complains to this Court, that the assignees have taken these shares as the property of the bankrupt, which he asserts they had no right to do, as they merely stood in the bankrupt's name as a trustee for the petitioner. In answer to this statement the assignees say, that inasmuch as the petitioner permitted the shares to stand in the name of the bankrupt as the reputed owner, they come within the 72d section of the Bankrupt Act, which empowers the Commissioners to sell and dispose of any goods or chattels which the bankrupt has in his possession, order, or disposition, at the time he becomes bankrupt, by the consent and permission of the true owner, and whereof the bankrupt was reputed owner; and the assignees further contend, that these shares are goods and chattels within the meaning of that clause. There is no doubt that shares in an insurance office, like other choses in action, are goods and chattels within the meaning of the 72d section; but it is also clear, that where property of this nature is held by a bankrupt as trustee, it does not pass to his assignees. Then, where there exists a custom which is known, that property standing in the

name of a man in the books of a public company may only be his nominally, while the real right to it may be in another person,—does the reputation of ownership attach to the mere nominal possession? It is not pretended in this case, that there was any fraud practised, or that the bankrupt obtained any false credit, from the circumstance of these shares standing in his name in the books of the Economic Assurance Office. The shares were entered in the name of the bankrupt, in compliance with a rule of the society, and pursuant to a practice known and permitted; and it appears, too, that this was done with the knowledge of one of the directors and the actuary. Here, therefore, I think that the property follows the title; and that the title of the bankrupt was merely as trustee. The mischief intended to be remedied by the 72d section is, where the title to goods and chattels is in one person, and the possession in another, so as to cause him to be considered the reputed owner of them. Then it has been contended, that the 79th section is to be confined to cases, where the shares are actually entered in the books of the Company in the bankrupt's name *as trustee*. But I do not think that that section is to be so strictly construed. Supposing the petitioner had purchased two shares in this Company, standing in the name of another person, who became bankrupt before the regular transfer was made in the books—would the bankrupt not be considered as a trustee for the purchaser, within the meaning of the 79th section? In the books kept at the Bank of England, it is never stated that the party, in whose name any stock is entered, holds it as trustee; and it has never been held to pass to the assignees of that party, because he is

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not described in the Bank books as trustee. In this case, then, as was said by Lord *Eldon* in *Ex parte Martin*(*a*), the possession of the shares by the bankrupt was connected with his title as trustee, and was (as far as any thing has appeared to the contrary) perfectly consistent with such title.

Sir J. CROSS.—It does not appear to me, that the petitioner has done any thing in contravention of the rules of this society; but even if it were so, I cannot conceive what right this would give the assignees. It has been contended on behalf of the assignees, that the two shares in question were, by the consent of the true owner, in the possession, order, or disposition of the bankrupt, as reputed owner, within the meaning of the 72d section of the Bankrupt Act. But I collect from the facts of this case, that the owner of any shares in this Company has no other possession of them, than the shares being entered in his name in the Company's books. Here, therefore, the bankrupt had not only the possession, but he had the legal title to the possession; consequently the 72d section does not apply. But then comes the question, whether, as the petitioner purchased the shares for his own benefit, and paid the price for them to the out-going shareholder, the possession of the bankrupt is not subject to an equitable trust. And I think it is quite clear, that his possession must be so considered. I felt a little doubt at first, as to what would be the result, if a party, being the real owner of any shares in this company standing in his own name, was to transfer them into the name of another person—whether in such case the

(*a*) 2 Rose, 331; 19 Ves. 494.

shares would not be considered to come within the 72d section? If such a transfer had been of the possession of visible goods and chattels, there would certainly have been great difficulty in saying, that it did not come within the meaning of the 72d section; but I think it would be different with property of this description. Then, as to the point which has been relied on by the counsel for the assignees, that the words of the 79th section applicable to a bankrupt's possession of stock are, "standing in his name as trustee;" and, therefore, that it should have appeared in this case, from the books of the Company, that the shares in question were *entered* in the bankrupt's name *as trustees*;—there might perhaps have been some doubt upon this point, if it had not been that the following section (s. 80.) of the act of parliament, draws a distinction between stock standing in a bankrupt's name as trustee, and stock standing in his name as the real owner; for the words of the 80th section are, any stock "*standing in his name in his own right.*" So that the statute evidently contemplated, that stock, though standing in the name of the bankrupt as apparent owner, might nevertheless not be standing in his name *in his own right*. I am therefore of opinion, that where the entry of the shares in a party's own name is incidental to his title as trustee, the shares must be taken to belong to the *cestui que trust*; but if such entry is incidental to his title as owner, then, and then only, they are to be considered the property of the party in whose name they are so entered.

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Sir G. ROSE.—The 79th section does not govern the question of order and disposition, which is entirely

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confined to the construction of the 72d section of the act of parliament. Where property of this description stood in the name of a party apparently as owner, but in reality as trustee, it could formerly only have been got at by the help of extrinsic evidence, through the medium of a suit in equity; and all that the 79th section does is, to enable the real owner of the stock to apply to the Lord Chancellor by petition in bankruptcy, instead of by bill in equity. The assignees have no right to these shares, if they were merely standing in the bankrupt's name as trustee; but whether he can be considered to be a trustee or not, may be a question. If the question is put, as in the case of a mere delivery of a chattel, without more, the title to it would vest in the assignees under a subsequent bankruptcy; and the Court could attach it as being in a visible ownership. But if it be not a chattel to be operated upon by actual delivery, but a chose in action, which cannot be delivered, it will be important to consider, whether at the time of the bankruptcy the equitable title was complete as against the assignees, who, of course, have all the legal title which the bankrupt previously possessed? A Court of Equity and of Bankruptcy has said, that although you assign a bond, or any other chose in action, yet if no notice is given to those persons against whom the assignment is to operate, and the rights of creditors intervene, the Court will not give effect to it, but leave the party to any other remedy he may have at law. If you put the case of the assignment of so much stock in the Bank, it would be quite idle then to give notice of the assignment being subject to any trust; for the Bank, it is well known, takes no notice of trusts. But does that

apply to a company who receive and act upon such notices? With respect to the written declaration of trust in this case, if the right of the petitioner depended upon that merely, I should feel some difficulty in saying, that these shares were not in the reputed ownership of the bankrupt; for the declaration of trust would not have prevented the bankrupt from selling these shares, or holding himself out as reputed owner of them. It does not appear, that the office refused to attend to notices of the assignment of shares by the proprietors; and, therefore, unless some sort of notice had been given in this case, I should have thought that the shares must be taken to have passed to the assignees. For I could never understand the principle on which it is contended, that though notice is required of the assignment of a bond, it is not requisite in the case of an assignment of property of this description, notwithstanding it is affected by a trust. But connecting the declaration of trust with the information given to one of the directors and the actuary, I conceive that that is tantamount to notice; and that as the matter stands, the petitioner is entitled to the order that he prays.

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ERSKINE, C.J.—If notice had been essential, I think there was sufficient in this case; but my judgment was founded on the declaration of trust alone.

Ordered as prayed.



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Westminster,
Nov. 16.

Ex parte THOMAS COPPARD and JOHN GATES.—In the matter of RICHARD THORNTON.

A bankrupt conveys his real estate to two trustees upon certain trusts for the payment of his debts, and subsequently enters into an agreement with them as to the sale of the property; after which he takes forcible possession of part of it, and the trustees bring an action of ejectment against him, which, with another action, is referred to the decision of an arbitrator. The award finds, that the creditors were entitled to recover in the action of ejectment, and directs that a sum of money which was due to the trustees, for expenses incurred by them in the execution of the trusts, shall be paid by instalments, and in default of payment, that the property shall be sold, and the proceeds applied in discharge of the debt due to the trustees. Held, that the award was no charge upon the land;

but that it did not destroy the lien thereon, which the deed had expressly given to the trustees for the expenses incurred by them in the execution of the trusts.

THIS was the petition of two creditors, claiming a lien on certain property of the bankrupt, under the following circumstances:—

In the year 1823, the bankrupt, who carried on the business of a brewer, conveyed all his real and personal estate, consisting (amongst other things) of a brewery and two public-houses at Horsham and Brighton, subject to incumbrances, to the use of the petitioner *Coppard* and *John Dawson*, in trust to discharge several debts due from the bankrupt. And it was agreed, that if the above trustees should think it advisable to advance money out of their own funds for the more speedily liquidating the debts, they were to be at liberty so to do; and in that case should retain possession of the property, until they should be reimbursed the money laid out by them, with liberty to sell the property for any of the above-mentioned purposes. Down to December 1824, various sums of money were expended by the trustees, and at that time *Dawson* was removed from the trust, and the petitioner *Gates*, by the bankrupt's desire, was substituted in his place. In January 1825, *Gates*, at the request of the bankrupt, paid to *Dawson* 1248*l.* 10*s.* 11*d.*, and in February following 151*l.* 11*s.* 9*d.*, making together 1400*l.* 2*s.* 8*d.*, in satisfaction of advances made by *Dawson* in execution of the trusts. *Dawson* died in September 1826; after which several other sums of money were advanced by the petitioners in execution of the trusts.

By agreement dated the 30th January 1827, and made between the bankrupt and the petitioners, the brewery with the two public-houses and other parts of the property, which had been so assigned by the bankrupt upon the before-mentioned trusts, were agreed to be sold by the bankrupt and *Coppard* to *Gates*, subject to certain conditions mentioned in the agreement.

Between the 30th January 1827 and the 22d July 1828, *Gates* advanced other sums of money, for the purpose of carrying on the business of the bankrupt.

Disputes arose respecting the terms of the agreement; and the bankrupt on the 22d July 1828 took forcible possession of the brewhouse, and ejected *Gates* therefrom; upon which an action of ejectment, and also another action, were commenced by the petitioners against the bankrupt. These actions were by an order of *nisi prius* referred to the decision of an arbitrator, to settle all matters in difference.

On the 3d January 1832 the arbitrator made his award; whereby he awarded, that as to one of the actions (being the action of ejectment commenced by the petitioner *Coppard* against the bankrupt, for recovery of the brewhouse,) the petitioner *Coppard* was entitled to recover therein; and that as to the other action, in which *Gates* was plaintiff and the bankrupt defendant, *Gates* was entitled to recover the sum of 790*l.* 9*s.*; and that, exclusive thereof, after giving credit for sums received by *Gates*, and the amount of so much as the bankrupt was, at the time of the order of reference, entitled to set off against the demand of *Gates*, the sum of 5776*l.* 5*s.* 5*d.* remained due to *Gates*, in respect of advances made by him in carrying on the brewery; and that upon taking the

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account between the petitioner *Coppard* and the bankrupt, and giving the latter credit for 334*l.* 5*s.* for beer had by *Coppard*, a balance of 690*l.* 6*s.* remained due to *Coppard*, for money advanced by him for the bankrupt. The arbitrator further awarded, that the petitioner *Gates* should pay all the liabilities of the brewery, and collect for his own use all money due thereto; and that in consideration of the advantage to be derived from *Gates's* collecting such debts, the sum of 1500*l.* should be allowed as a deduction from the sum of 5776*l.* 5*s.* 5*d.*; and that the sum of 4276*l.* 5*s.* 5*d.*, remaining after such deduction, together with the 690*l.* 6*s.*, with interest at five per cent., should be paid by the bankrupt to *Gates* by certain instalments; and in the event of no payment being made by a certain day, that all the estate and interest at law or in equity of the bankrupt in the messuages, brewhouse, and premises in the articles of agreement described, should be sold; and that out of the proceeds of the sale, if sufficient for that purpose, after satisfying the other prior incumbrances, the sums of 4276*l.* 5*s.* 5*d.* and 690*l.* 6*s.* should be paid to *Gates*.

On the 29th March 1833 a fiat was issued against the bankrupt; and on the 12th July following, the bankrupt's property at Brighton was by direction of the assignees put up for sale by auction; but no sale was effected.

On the 16th July 1833 *Gates* presented a petition to this Court, stating that he was a creditor for 4276*l.* 5*s.* 5*d.*, and that he was an equitable mortgagee of the property of the bankrupt at Horsham and Brighton, as would appear by the award already stated; and that the assignee, without authority, had advertised part of

this property to be sold; and therefore praying that he might be declared an equitable mortgagee of the premises in question, and might be permitted to bid at the intended sale; which was accordingly ordered; and the further consideration of the petition was adjourned.

At the sale which afterwards took place, *Gates* bid 1000*l.* for the brewery; and other persons bid for and were declared the purchasers of other parts of the bankrupt's property. But the amount of the purchase-money was insufficient to pay off the debt of *Gates*.

The petitioner prayed, that on payment of the expenses of the sales of the property, on which the petitioners claimed a lien, the residue of the purchase-money, after discharging the prior incumbrances, should be paid to the petitioners.

Mr. Richards, in support of the petition. There is no question but that the deed of 1823 gave to the petitioners a lien upon all the bankrupt's property therein mentioned, in respect of any sums which they should advance in performance of the trusts specified in the deed; and it gave them, therefore, a right to stand precisely in the place of the *cestui que trust*, for the purpose of securing such advances. But, independent of any provision contained in the deed, it is a right founded on first principles, that if a trustee advances his own money in execution of the trusts reposed in him, he shall have a lien on the property entrusted to him, out of which he was to have discharged those trusts. The deed, however, precludes the necessity of arguing to that extent; for the right of lien is there placed beyond all doubt. Up to the time of the award, there

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is nothing to destroy that lien ; nor is there any thing in the award itself, from which it can be contended that the lien was in any way affected or diminished.. He was then stopped by the Court.

Mr. *Russell*, for the assignee. The only mode, in which the petitioners can claim any right of lien, is under the award ; which must be looked upon as a fresh arrangement superseding the rights acquired under the deed of 1823 ; and there is nothing in the award, which gives the petitioners the lien they now seek. The petition itself seems to rest the whole claim of the petitioners on the award alone, and makes no demand of lien, in reference to the deed. But at the time of the execution of the deed the bankrupt was a trader ; and the deed itself, being an assignment of all the bankrupt's property, would therefore constitute an act of bankruptcy, and be, *ipso facto*, void ; so that under the deed the petitioners could derive no rights superior, or equal, to that of the assignee under the bankruptcy. It is not a deed executed with the formalities required by the Bankrupt Act (a), so as to bring it within the exceptions contained in the fourth section of the statute. [Sir *G. Rose*. I do not think the assignees can avail themselves of that objection. It is very questionable, if that deed would amount to an act of bankruptcy ; besides which, you must prove the petitioning creditor's debt, on which the present fiat is founded, to have been existing at that time ; as in the case of *Ex parte Birkett, re Reynolds* (b).] [*Erskine*, C. J. Unless the petitioning creditor's debt accrued anterior to that act of bankruptcy, it can be of no

(a) 6 Geo. 4. c. 16. s. 4.

(b) 2 Rose, 71.

avail.] Then, if the deed itself is to be considered as establishing the lien, the claim of the petitioners must, on reference to the terms of the deed, be looked upon as a legal, and not a mere equitable, mortgage; and therefore the petitioner has no right to come here, but ought to have gone before the Commissioners in the first instance. In that point of view, therefore, the petitioner is in error in presenting this petition. [Sir *G. Rose*. The award, by finding the amount of the debt due, and being binding on the parties by reason of the terms of the submission creating an agreement, may give a right to proof; but no lien is created, except by the deed of 1823.] [Sir *John Cross*. The award is founded on the submission to refer; and this amounts to an agreement that that shall be done, which the arbitrator finds to be right; and the award, when made, becomes part of the agreement itself.] [Mr. *Richards*. Suppose *A.* agrees with *B.* to purchase a house of him, for such sum as, in the opinion of a surveyor, shall be deemed sufficient; it is clear, that upon the finding of the surveyor a Court of Equity would enforce specific performance of the agreement; and in this case we claim a lien for the sums found to be due to us by the award.] Mr. *Russell*. The agreement of 1827 is no charge whatever on the land. The deed of 1823 is the sole agreement, on which the claim to any lien on the land can be insisted on; and the subsequent award, making no reference to that deed or agreement, does not fix the sums awarded to be paid by the bankrupt as a charge on the land. The sole question then to be determined here is, whether, under the order of reference of *nisi prius*, the award of the arbitrator gives to the petitioners an estate in the land. The arbi-

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trator had no power, by the order of reference, to give an interest in the land; and therefore, if he had done so, it would have been an excess of his authority, and not binding on the bankrupt, but more especially as against the bankrupt's assignees.

Mr. Richards, in reply. The award ascertained the sums due to the petitioners; and directed that if those sums were not paid as therein mentioned, the property should be sold, and the produce applied to pay the petitioner's debt. But, independently of this, the prior conveyance and agreement give the petitioners every right they can desire; and although *Gates* went in under the reference, yet he waived no prior right by so doing.

ERSKINE, C. J.—Whatever security the petitioners were entitled to by virtue of the original deed, will be fully given to them by the order we are about to make, and whatever money has been laid out, which they were authorized to expend, will be also properly secured to them. But I cannot see, that the petitioners acquired any rights under the subsequent agreement, superior to those given them under the deed of 1823. I do not think, either, that the award gives any additional right. If the point of reference to the arbitrator had been to determine the amount of sums disbursed by the petitioners, for expenses incurred by them under the deed, then the award might be binding on the land, as to the sums awarded to be due; but the reference was, merely, as to the matters in dispute in the actions commenced by the petitioners against the bankrupt. The award however directs the property

to be sold, and the debts to the petitioners to be paid out of its produce in a certain manner. If the bankrupt had refused to perform the award, the petitioners would, supposing no bankruptcy had interfered, have been driven to the Court to enforce its performance; and then the question of the authority would necessarily have been raised; and under that form of proceeding, or under the present petition,—which, under the circumstances, is the same thing as a suit in equity,—in order to give effect to the claim under the award, it must be proved that the bankrupt agreed that the lien should be given. This cannot be done; and no case has been cited to show, that the arbitrator, without such agreement, had authority to do that which, the petitioners contend, he has done on the present occasion. But the order proposed will meet the justice of the case.

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Sir J. Cross.—The petitioners have stated their rights perhaps too largely; although they might possibly have been correct, according to the true construction of the agreement of reference. But this has never been produced, and therefore the Court knows nothing of it. Many other differences may have been submitted by this agreement to the decision of the arbitrator; perhaps the identical point; and perhaps the submission might contain an agreement to give the lien now contended for. In the absence of the agreement of reference therefore, I, for one, cannot presume that the arbitrator has exceeded his authority; those, who contend he has done so, should establish it as a fact. The assignees, however, will not be prejudiced by the order which we are about to make.

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Ex parte
 COPPARD
 and another.

Sir G. ROSE concurred in what fell from the Chief Judge.

The Order directed, that it should be referred to the Registrar to inquire, whether any and what sums were due to the petitioners, or either of them, as trustees, in respect of monies expended in the due execution of the trusts; and that in making such inquiry, regard should be had to the award (a); that the property remaining unsold should be put up to sale, with liberty to the petitioners to bid; that the proceeds should be applied to pay the expenses of the sale, in the usual manner, and then in payment of what was due to the petitioners, with liberty to prove for any deficiency; reserving further directions and costs.

(a) The Registrar afterwards reported, that the sum claimed by the petitioners was due to them in respect of monies expended in the due execution of the trusts mentioned in the deed.

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Gray's Inn Hall,
July 30.

Ex parte GEORGE WILLIAMS and others.—In the matter of JOHN BIRKETT WIENHOLT.

An order of the Lord Chancellor made in a suit brought by the assignees, was, on their application, ordered to be registered in the Court of Bankruptcy.

IN this case the bankrupt had, many years after the issuing of the commission, become entitled to a considerable property, under a settlement made upon his father, which settlement was for a long time unknown to his assignees. The commission issued on the 1st May

1802; under which 92 creditors proved debts to the amount of 74,096*l.* 3*s.* 6*d.* The party who made the settlement died in 1817; and the bankrupt and his sister were, after much litigation, declared to be entitled to a large sum of money in equal shares, by virtue of the terms of the settlement, and the will of the party who had made it. In June 1833 the assignees instituted a suit in Chancery against the bankrupt and various other parties, for an account of all sums he had so recovered. Proposals having been made to compromise this suit, a meeting of the bankrupt's creditors was called to consider of such proposals; when nineteen creditors, whose debts amounted to 44,654*l.*, approved of the compromise. By an order of the Court of Chancery made in this suit on the 12th July 1834, it was referred to the Master to consider, whether it would be for the benefit of the bankrupt's creditors, that the compromise should be carried into effect; and on the 25th July the Master made his report, whereby he certified it would be for the benefit of the creditors, that the compromise should be carried into effect. On the 26th July the Lord Chancellor ordered the Master's report to be confirmed; but, as he doubted his jurisdiction to order this with respect to the assignees, he ordered that the assignees should be at liberty to apply to the Court of Review to approve of such compromise being made. It appeared that the assignees would, if the compromise was carried into effect, receive a sum of 10,000*l.* and upwards, to be divided among the creditors; and the assignees now stated, that they were desirous to accept the same.

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Ex parte
WILLIAMS
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and others.

They prayed, therefore, that they might be directed to compromise their claim in the said suit, pursuant to the terms approved of by the Master and confirmed by the Lord Chancellor.

Mr. *Swanston*, and Mr. *Bacon*, appeared in support of the petition.

The COURT, after some deliberation, ordered, that the Lord Chancellor's Order might be registered in the Court of Bankruptcy; but declined making any further Order.

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Westminster,
November 11.

On a petition to stay the certificate by a creditor, at whose suit the bankrupt is in custody, the bankrupt must be discharged before the petition can be heard.

The rule on such petitions is, that the party objecting to the certificate, must himself make out a case to stay it; the bankrupt is not bound to answer mere allegations founded on information and belief.

The non-payment of any dividend is not, of itself, a sufficient reason to stay the certificate.

Ex parte GREEN.—In the matter of *ARMITSTEAD*.

THIS was the petition of a creditor, who had not proved under the fiat, to stay the bankrupt's certificate. It appeared, that the fiat issued in February 1833, and that the bankrupt's last examination had been adjourned *sine die*; the assignees having, with the consent of most of the creditors, made arrangements with the bankrupt, that he should continue to carry on his business for the benefit of his creditors; and they accordingly never took possession of his effects. In the year 1816 a former commission had also issued against the bankrupt, under which no dividend was paid, neither had any dividend been paid under the present fiat. The petitioner had brought an action against the bankrupt for the recovery of his debt, and the bankrupt was now in custody at the suit of the petitioner in this action.

Mr. *Swanston*, who appeared for the bankrupt, took a preliminary objection to the petition, viz., that the bankrupt must be discharged from custody before the petition could be heard; and cited *Ex parte Bostock*(a), where it was held, that a creditor, by petitioning to stay the certificate, makes his election to come in under the commission for every provable debt which may be owing to him from the bankrupt; and that the bankrupt must be therefore discharged from any action pending against him by the creditor, in respect of any such debt, before the petition can be proceeded in.

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Ex parte
GREEN.

Mr. *Ayrton*, in support of the petition, said, that in *Ex parte Bostock* the creditor applied to *prove*, as well as stay the certificate; which was not so in the present case.

ERSKINE, C.J.—If you petition to stay the certificate, you come in under the commission, as much as if you had proved your debt.

Sir J. CROSS.—If that were not so holden, a bankrupt could be frequently impeded in obtaining his certificate, by the mere circumstance of one creditor holding out, and refusing to come in under the commission. The petitioner has no *locus standi* in Court, unless he forthwith discharges the bankrupt out of custody.

Sir G. ROSE concurring,

The petition was ordered to be dismissed,
with costs.

(a) 1 Dea. & Chit. 383.

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GREEN.

Shortly after this order was made, the solicitor for the petitioner, who was not in Court when the petition was called on, applied to the Court that the petition might be restored to the paper, on the ground that the petitioner consented to abandon the action and discharge the bankrupt, and make his election to come in under the fiat; upon which the Court ordered the petition to be restored to the paper.

Mr. *Ayrton* then proceeded to read the petitioner's affidavit in support of the petition, which stated, that the petitioner was informed and believed that some of the bankrupt's creditors, who had signed his certificate, had been induced to do so in consequence of some security, which the bankrupt had given them for payment of their debts. [Sir *G. Rose*. Information and belief is not worth one farthing against a certificate. If that is all the evidence you have, the certificate must go.] The swearing to information and belief calls for some answer from the bankrupt. [*Erskine*, C. J. No—the rule upon petitions to stay the certificate is, that the party objecting to the certificate must himself make out a case to stay it.] The circumstance of the bankrupt having paid no dividend under the former commission, nor under the present fiat, affords a sufficient case; as appears from *Ex parte Cunningham* (a). [*Erskine*, C. J. The petitioner in that case prayed, that creditors might come in and dissent, but did not pray to stay the certificate on that ground alone; and, from what Lord *Eldon* says in *Ex parte King* (b), though the non-payment of any dividend

(a) Mont. B. L. 152.

(b) 11 Ves. 417.

may afford a strong reason for staying the certificate, it is by no means a conclusive reason.]

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Ex parte
GREEN.

Mr. *Swanston*, *contra*, was stopped by the Court.

ERSKINE, C.J.—This is quite a different case from that, where a creditor receives a *bonus* to induce him to sign the certificate; for nothing of that kind appears in the present case. It cannot for a moment be denied, that the mere circumstance of no dividend having been paid under the fiat, is not of itself sufficient to stay the certificate. It may be one of several circumstances which may be taken into account, and may be one of suspicion as to the integrity of the bankrupt's conduct. But here it appears, that the creditors had such confidence in the bankrupt, that he was allowed to carry on his business for their benefit. Then, if there having been no dividend is not enough to stay the certificate, upon what other ground are we called upon to refuse it in this case? The only one alleged is, the mere information and belief of the petitioner, that some security was obtained by some of the creditors from the bankrupt, in consideration of their signing the certificate,—without adducing any evidence whatever of that fact. But, on petitions to stay the certificate, there must be an allegation of a specific fact, and such evidence of it, as will be of itself sufficient to induce the Court to withhold the certificate. The affidavits on the other side, however, expressly deny the truth of what the petitioner has stated on mere hearsay evidence; and allege, moreover, that the arrangement entered into by the bankrupt with his creditors, for continuing his business, was for the benefit

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Ex parte
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of *all* his creditors; nor does there appear any thing in that arrangement, to suggest the slightest imputation of fraud.

Sir J. CROSS.—The only ground that the petitioner has alleged for staying the bankrupt's certificate is, that the signatures of some of the creditors to it were purchased by some security given to them by the bankrupt. But the petition has adduced no evidence of this; and the bankrupt positively denies, on his oath, that such was the fact.

Sir G. ROSE.—There is no doubt that the rule on proceedings to stay the certificate is, that the petition must state facts sufficient to induce the Court to stay it; otherwise no order will be made for that purpose. With respect to the objection, that no dividend has been paid under the commission, that is a very slight circumstance on which to found an opposition to it; for the act of parliament never contemplated the amount of the dividend, be it more, or be it less, as an objection to the bankrupt obtaining his certificate; and never, in my experience, has the certificate been stayed for this cause alone. As to any statement of information and belief in a matter of this kind, that is so very loose and uncertain a charge, that it is impossible for the Court to deal with it. Then is there any evidence before us of any one fact sufficient to induce the Court to withhold the certificate from this bankrupt, after he has obtained the signatures of the requisite number of creditors. The arrangement made by the assignees with the bankrupt, as to his carrying on his former business, was, it appears, made

under the sanction, and with the approbation, of the Commissioners; and does not support the allegation in the petition, that securities for their debts were improperly given to the bankrupt's creditors, to induce them to sign his certificate.

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Ex parte
GREEN.

The Petition was finally dismissed with costs.

Ex parte STEVENS.—In the matter of STEVENS.

THIS was the petition of a creditor, with whom the bankrupt had deposited a policy of insurance on the life of a third person, by way of equitable mortgage, praying for the usual order of sale.

Westminster,
Nov. 11.

On a deposit of a policy of assurance by way of equitable mortgage, the *onus* does not lie on the mortgagee, to show that notice of the deposit was given to the office before the act of bankruptcy,—but with the assignees, to show that it was not.

Mr. *Wright* appeared in support of the petition.

Mr. *Swanston*, *contra*, objected to the sufficiency of the allegation in the petition, as to notice of the deposit being given to the Insurance Office, the petitioner not expressly alleging that the notice was given before the act of bankruptcy. It was also suggested, that it would be very inexpedient to sell the policy at the present moment, inasmuch as the party whose life was insured was so ill, that he was expected every day to die.

The COURT thought, that the *onus* lay on the assignees, to shew that notice was not given to the office before the act of bankruptcy; and that it was their duty to inquire how the fact really was; and if it turned out, upon inquiry, that the notice was given *after* the

1834. act of bankruptcy, that the assignees might then come
again to the Court.

Ex parte
STEVENS.

ORDERED, that it should be referred to the
Commissioner to direct a sale of the policy,
taking into his consideration the time that
would be most advantageous for such sale.

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Westminster,
Nov. 14.

An assignee, who has been guilty of misconduct, applies to be discharged, on payment of costs. The Court refused to act on the suggestion of the respondent, that the nature of his misconduct should be stated in the order for his removal; but directed that the order should be without prejudice to any future application against him.

Ex parte ANGLE.—In the matter of SMITH.

THIS was the petition of an assignee, praying to be discharged from the trust. The petitioner acknowledged that he had been guilty of great misconduct, that the debt he had proved was an unfounded claim, and that in point of fact he was a debtor to the estate; but he offered to pay the costs incidental to his removal, and to render any assistance which might be required of him.

Mr. *Swanston*, in support of the petition, said that the petition was in the paper for hearing some days ago; when it was suggested that there was a counter-petition pending, praying that the assignee might be removed on the ground of misconduct, and that it would be very inconvenient that he should be discharged before that other petition came on for hearing. But as that petition has never been served on the assignee, there is, consequently, no respondent; and therefore the assignee is entitled to an order on this petition.

Mr. *J. Russell*, and Mr. *Bethell*, *contrà*, urged that the real cause of the removal of the assignee should be made to appear in the order—the assignee having

admitted that he was guilty of proving a fictitious debt. The assignee now applied, on his own petition, to be removed, to prevent the exposure of his misconduct. It was therefore proper, under these circumstances, that the grounds of his removal should be recited in the order, and that he should be directed to pay such costs as the Commissioner should find he had occasioned to the estate by his misconduct.

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Ex parte
ANGLE.

ERSKINE, C. J.—The circumstances disclosed by the respondent confirm the necessity of the immediate removal of the petitioner from being assignee; but if we make an order in the terms suggested by the respondent, the assignee would then not draw up the order, and he would continue assignee, at the peril of the estate. The proper way of proceeding is, to present a petition against the assignee, making the charge against him specially, and calling upon him, in the usual manner, to answer the matters of the respondent's affidavit. The order for the assignee's discharge on this petition will not cripple the jurisdiction of the Court to deal with him hereafter, as the justice of the case may require.

Sir J. CROSS.—If the respondent had applied, that the order on this petition should be deferred, until a petition had been presented against the assignee, embodying the charges stated in the respondent's affidavit, I should have thought it but reasonable that we should have forbore to make any order at present on this petition. But I think there is no ground for having these matters introduced into the order of the Court on this petition.

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Ex parte
ANGLE.

Sir G. ROSE.—It is impossible to engraft on our order on this petition the allegations contained in the respondent's affidavits. The respondent must present a petition; and the party, though discharged from his trust by our present order, will still be *quasi assignee*, for the purpose of any complaint against him on the part of the respondent.

ORDERED, that the petitioner should be discharged from being assignee, and that a new assignee should be chosen in his room, the petitioner paying all the costs occasioned by his removal; and that the Order should be without prejudice to any future application against the petitioner, in respect of any matter or thing in this bankruptcy.

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Ex parte JOHN CARLON.—In the matter of THOMAS
BIRKS.

Westminster,
Nov. 14.

The bankrupt, having a contract with the Ordnance Board for the delivery of a certain quantity of candles, and being unable to complete the contract, applies to the petitioner to assist him, by delivering a part of the quantity contracted for; which the petitioner agreed to do, provided the candles were delivered in the petitioner's own name. The bankrupt undertakes to do this, makes out a bill of parcels in the petitioner's name, and sends his own waggons for the purpose of delivering the candles at the Ordnance depôt. The official assignee, after the bankruptcy, receives from the Ordnance Board the price of the candles which had been furnished by the petitioner. *Held*, that he was bound to refund it to the petitioner.

THE petitioner in this case prayed, that the official assignee might be directed to pay over to him a sum of money which had been received under the following circumstances:—

It appeared, that in March 1833 the bankrupt, who carried on the business of a tallow-chandler, represented to the petitioner, that unless the bankrupt could make and dispose of a large quantity of candles, he

could not complete the contract. The petitioner agreed to do this, provided the candles were delivered in the petitioner's own name. The bankrupt undertakes to do this, makes out a bill of parcels in the petitioner's name, and sends his own waggons for the purpose of delivering the candles at the Ordnance depôt. The official assignee, after the bankruptcy, receives from the Ordnance Board the price of the candles which had been furnished by the petitioner. *Held*, that he was bound to refund it to the petitioner.

should be obliged to discharge many of his men, and his manufactory would become almost useless to him; and he urged the petitioner to buy of him about 1000 dozen pounds of candles, stating that he, the bankrupt, could for ready money sell such candles at the rate of 5s. 9d. per dozen pounds, which would yield to him a profit; and that if the petitioner kept the candles until the summer, he, the petitioner, would realize sufficient profit to cover the outlay and the expenses. The petitioner, being desirous of assisting the bankrupt, was induced to accede to his request; and accordingly purchased of him candles to the amount of 300L., and boxes for the amount of 12L., for which the petitioner paid the bankrupt before the candles were made or delivered, in order to enable him to purchase tallow at first hand; but the candles packed in boxes were afterwards made and delivered by the bankrupt to the petitioner.

In July 1833 the bankrupt represented to the petitioner, that he was under a contract with the Board of Ordnance to deliver to them a certain quantity of candles, and that he was unable to complete the contract. Knowing, therefore, that the petitioner had the above-mentioned candles in his possession, he requested him to deliver a certain quantity at the Ordnance dépôt in Tooley Street; which the petitioner agreed to do, provided the candles could be delivered in the petitioner's own name, so that the petitioner would have a right to call for the payment of them; and the bankrupt undertook to make inquiry for that purpose. The bankrupt having afterwards informed the petitioner, that the candles would be received at the dépôt in his name, and that the petitioner would have a right

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to call for payment of them, the petitioner consented to deliver to the Ordnance a certain quantity, amounting in value to the sum of 204*l.*, packed in boxes, which were to be returned to the petitioner. The petitioner, being unacquainted with the precise mode of transacting business, requested the bankrupt to make out the bill of parcels to accompany the candles; which he accordingly did, and sent the same to the petitioner for his perusal; this enabled the petitioner to see that the bill of parcels was made out in his own name as the seller. The petitioner having no waggons and horses, the bankrupt proposed to him that the waggons of the bankrupt should convey the candles from the house of the petitioner to the Ordnance depôt; and the candles were accordingly, with such bills of parcels, so delivered. The candles were, in July 1833, in the possession of the petitioner at Kilburn, in Middlesex; and the price, at which the petitioner was to be paid for them, was at the rate of 6*s.* per dozen pounds; but the price, at which the bankrupt had contracted to deliver them to the board, was at the rate of 5*s.* 7*½d.* per dozen pounds. The difference between these two prices was paid to the petitioner by the bankrupt previous to the delivery of the candles by the petitioner, in order that the petitioner might receive the remainder from the Board of Ordnance.

On the 7th August 1833, a fiat in bankruptcy issued against *Birks*; shortly after which the official assignee applied to the Board of Ordnance, and received the sum of 86*l.* 10*s.*, for part of the candles so delivered by the petitioner, as well as the sum of 6*l.* 10*s.* for the boxes in which the candles were delivered; and he declined to pay over this money to the petitioner.

The petitioner therefore prayed, that the official assignee might be ordered to pay to the petitioner these several sums of 86*l.* 10*s.*, and 6*l.* 10*s.*

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Ex parte
CARLOW.

Mr. *Chandless*, in support of the petition, undertook that the petitioner should bring no action.

Mr. *Swanston*, for the assignees. The question in this case is entirely one of legal right, namely, whether the petitioner was entitled to receive this money, or the bankrupt. The contract for the candles was made by the Board of Ordnance with the bankrupt; and he was the party, to whom the Ordnance was bound to pay the price of them. The Board knew nothing of the petitioner; and the candles were delivered, in performance of the bankrupt's contract. If the Board of Ordnance were not indebted to the petitioner, he could not recover it from them in an action at law; and therefore he is not entitled to receive the money, under an order of this Court. The candles, or the price of them, must be considered as having been in the order and disposition of the bankrupt.

ERSKINE, C. J.—The petitioner's claim in this case does not depend upon any technical ground, but on the sound principles of justice. If the petitioner had re-sold the candles to the bankrupt, and then the bankrupt had sold them to the Ordnance, the case would have been presented to us under a different aspect. But the petitioner plainly showed by his conduct, that he was unwilling to trust the bankrupt; for he stipulates to send the candles to the Ordnance Board in his own name. In an action at law for recovery of the

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price of the candles, under these circumstances, there is no doubt but that he would have been entitled to use the original contractor's name. If the bankrupt had, before his bankruptcy, received the money from the Ordnance Office, that would also have made some difference in the case; for the petitioner then could only have proved for the amount under the fiat. But the payment was not made until after the bankruptcy; the money therefore, which has been received by the assignee, is, to all intents and purposes, the money of the petitioner; and the assignee must be considered as a trustee for the party lawfully entitled to it, upon the same principle, as when the holder of a bill of exchange receives more than the balance due to him on the bill, he holds it as trustee for the party who is really entitled to it. It is impossible to contend in this case, that the candles were in the order and disposition of the bankrupt, with the consent of the true owner.

Sir J. CROSS.—I think, after proof of the facts as stated in this petition, that this case is a very clear one. It appears, that the bill of parcels of the candles was originally made out in the name of the petitioner as the seller, pursuant to the stipulation that he made with the bankrupt for that purpose. It is very probable, however, that the bankrupt afterwards substituted his own name in a different invoice; for it is not reasonable to suppose, that the Ordnance Board would otherwise have paid the price of them to the official assignee. But we are now to consider what was the authority given by the petitioner to the bankrupt; and that was only to sell them in the name of the petitioner, and not in the bankrupt's own name.

Sir G. ROSE.—I never knew a case, in which assignees could act more properly, than by refunding this money to the party who is really entitled to it, and thus show that they do not seek any benefit from the bankrupt's fraud; for there appears to be little doubt, that the bankrupt fraudulently sold the goods to the Ordinance Board in his own name, after an express agreement on his part to deliver them in the name of the petitioner. The assignees, therefore, cannot take advantage of this fraud, but must hold the money as received for the use of the petitioner.

Ordered as prayed.

Ex parte TAYLOR.—In the matter of PERCIVAL.

THIS was the petition of a creditor to stay the bankrupt's certificate, and also to supersede the fiat, on the ground of its being fraudulently concerted, and for the mere purpose of enabling the bankrupt to procure his certificate. It appeared, that the petitioning creditor was the bankrupt's own father, to whom the bankrupt was clerk, at a salary of 70*l.* a-year. The balance sheet filed with the proceedings, contained this extraordinary entry:—"Debts, none—creditors, none—profits, none—losses, none."

Mr. *Twiss* appeared in support of the petition.

Mr. *Swanston*, and Mr. *Bacon*, who appeared for the bankrupt, took a preliminary objection to the petition, who endeavours to support a case of fraud; whether the costs are

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Westminster,
November 14.

A creditor, who becomes bankrupt after proving his debt, may nevertheless petition to stay the first bankrupt's certificate, if the assignees of the creditor do not interfere.

Semble, that when a fiat is issued against a trader who has no property, it ought at least to appear, that there was some prospect of recovering property by means of the fiat.

Costs are always given against any party appearing against a petition, who endeavours to support a case of fraud; whether the costs are prayed, or not.

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hearing of the petition, on the ground that the affidavit in support of it was sworn before the petition was presented; the affidavit having been filed on the 14th October, and the petition not presented until the 15th.

Sir G. ROSE.—Let the petitioner swear his affidavit again, and that objection is disposed of.

Mr. *Swanston* next objected, that the petitioner was not a legal creditor of the bankrupt; for the petitioner himself had become bankrupt since he had proved the debt under the present fiat. The debt, therefore, became the debt of his assignees, and was no longer the debt of the petitioner. With respect to the allegation of the fiat being concerted,—concerted commissions are protected now by the act of parliament (a). [*Ers- kine, C.J.* Not if a commission is *fraudulently* concerted between the bankrupt and the petitioning creditor.] Then, as to what is alleged in the petition, of the fiat being issued for the sole purpose of enabling the bankrupt to obtain his certificate, this is no circumstance of fraud; nor has it ever been determined, that a commission would be bad, although issued for such a purpose. The Court ought to require evidence of an *exclusive* intention of the petitioning creditor to effect some other object, than that of distributing the assets. If there is but a mixed intention, the Court cannot say then that the fiat is bad.

ERSKINE, C. J.—The fiat in this case appears to me

(a) See 6 *Geo.* 4. c. 16. s. 7.; but that only extends to a case, where the Commission is founded on the particular act of bankruptcy there specified, viz. filing a declaration of insolvency at the Bankrupt Office.

to have been fraudulently concerted between the bankrupt and the petitioning creditor, for the purpose of white-washing the bankrupt; nor has the petitioning creditor made any attempt whatever to support the fiat. With respect to the objection made to our hearing this petition, on the ground that the petitioner had become bankrupt since he proved the debt, and was therefore no longer a creditor, the answer is, that the petitioner is a creditor, and may exercise the rights of a creditor, if his assignees do not interfere. The Courts, indeed, have gone so far as to hold, that a bankrupt may even sue out a commission as petitioning creditor, unless his assignees interfere to prevent him.

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Sir J. CROSS.—It does not appear in this case, that the assignees of the petitioner have done any act to repudiate his right to present this petition, on the ground of his bankruptcy having occurred subsequent to the proof of his debt; and therefore the objection to the petition, on that ground alone, does not seem to be tenable.

Sir G. ROSE.—Where a bankrupt has no property, and the petitioning creditor, well knowing that fact, issues a fiat against him, not for the purpose, of course, of any distribution of property, but for the mere purpose of enabling the bankrupt to obtain his certificate, and get discharged from his debts, without paying one farthing in the pound; in that case, it is impossible to deny that the fiat is void, on the ground of fraudulent concert. For, in order to render a fiat good, which is issued against a trader who has no property, it ought at least to appear in evidence, that there was some

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prospect of property to be got from issuing the fiat. The essential question here is, whether, besides the concert, there is fraud? The grossest mischief would be introduced into the law of bankruptcy, if we were to say, that the decisions invalidating concerted commissions were not to apply to a case of this kind, where the fiat has been fraudulently concerted. In regard to the objection, that the petitioner has no *locus standi* here to-day, because he has become a bankrupt himself since he proved his debt under this fiat,—it might perhaps have deserved some consideration, if the petitioner had been a bankrupt under two commissions, and had not paid 15s. in the pound under the second commission; because in that case it might have been a question, whether any property could vest in the petitioner, so as to constitute him a creditor. But as there is in this case only one fiat which has issued against the petitioner, I think, if his assignees do not interfere to claim any interest in the debt which the petitioner has proved, that he is entitled to claim all the rights incident to such proof; one of which is, to petition to stay the bankrupt's certificate. In my opinion, the fiat in this case ought to be superseded, with costs, as against the petitioning creditor and the bankrupt. For wherever parties appear on a petition which charges fraud, and the fraud is found by the Court, costs are always given against the party who supports the fraud.

Mr. *Swanston*, and Mr. *Bacon*, contended, that it was contrary to all precedent to give costs against a bankrupt, where they are not prayed by the petitioner. There was no attempt on the part of this petitioner to

fix the bankrupt with costs, and the usual course is to annul a fiat, at the costs of the petitioning creditor.

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ERSKINE, C. J.—Who is then to pay the costs of this day's proceedings? For the petitioning creditor does not appear to support the fiat. This Court has certainly the power to award costs against any party, whether they are prayed, or not; although in ordinary cases it does not do so, unless the costs are prayed.

Sir G. ROSE.—My impression is, that costs are always given against a party in a case of fraud, whether prayed or not—that is the practice. Seeing what kind of a case this was, I was rather anxious that the bankrupt should come in on this petition, that we might be able to visit him with costs; the rule being, as I have already stated, that where a party does appear in support of a case of fraud, costs are uniformly given against him.

ORDERED, that the fiat should be superseded,
with costs against the petitioning creditor,
and the bankrupt.

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— **Ex parte JOHN DAWSON and others.—In the matter of
JAMES FINDEN.**

*Westminster,
November 15.*

An order of dividend found that a certain balance was in the hands of one of the assignees, and directed that assignee to divide the same among the creditors. *Held*, that the other assignee, having never interfered with the control and application of the trust fund, was not liable to the creditors for the payment of the dividend.

THIS was a petition of several creditors, praying that a surviving assignee might be ordered to pay to the petitioners the final dividend which had been declared of the bankrupt's estate. The commission issued so far back as the 19th January 1804, and the respondent, *William Sturch*, was chosen one of the assignees. Two dividends of 2s. 6d. and 2d. in the pound had been paid to the creditors; the last of which was declared on the 28th December 1813. In the year 1827 a considerable accession of property devolved to the bankrupt under the trusts of his marriage settlement, which was sold by *John Chatfield*, the acting assignee; and on the 27th March 1827, a final dividend was declared of 11s. 5d. in the pound—this being 23 years after the opening of the commission, and 14 years after the last previous dividend. *Chatfield*, and *Packer*, the third assignee, had both since died, leaving no personal representatives; and *Sturch* was now the only surviving assignee. The petitioners were wholly ignorant of this last dividend having been declared, until the month of April last; when two of the creditors summoned *Sturch* before the Commissioner, to show cause why the final dividend had not been paid. *Sturch*, however, refused to pay the same, unless compelled by an order of this Court.

In answer to the statements in the petition, it was sworn by the respondent *Sturch*, and the solicitor to the assignees, that when the bankrupt's property was sold in 1827, *Sturch* was in a very infirm and feeble state of health, and referred every thing to the discre-

tion of *Chatfield*, his co-assignee; that the sale of the property took place accordingly under the entire management and control of *Chatfield*, who alone received the purchase-money; that at an audit meeting before the Commissioners on the 27th February 1827, previous to the declaration of the dividend, the accounts were presented to them as made out in the name of *Chatfield* alone; but that one of the Commissioners having objected to that mode, and requiring them to be delivered in the joint names of *Sturch* and *Chatfield*, and to be signed by them both, the accounts and the memorandum of the audit were accordingly altered, by the addition of *Sturch's* name as one of the accounting parties, and signed by him under protest; that *Chatfield* undertook to pay the dividends to the creditors, and had the exclusive control and application of the trust funds; that *Sturch* never received any money out of the produce of the sale of this property, except his own dividend; that he was never privy to any misapplication of the trust fund by *Chatfield*, nor had any reason to suspect that any portion of the final dividend had never been paid; and that he was now 82 years of age.

It appeared, on inspection of the proceedings, that in that part of the order of dividend of the 27th March 1827, which stated a certain sum to be in the hands of the assignees, the word "assignees" had been altered from the plural to the singular number, by the letter *s* having been scratched out; but that this alteration had not been authenticated by the signature or initials of any of the Commissioners. The mandatory part of the order, however, directed the dividend to be paid out of the effects in the hands of *Chatfield*.

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Dawson
and others.

1834.

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Dawson
and others.

Mr. *Maclean* appeared in support of the petition.

Mr. *Montagu*, and Mr. *Pigott*, for the respondents, cited *Ex parte Learmouth*(a), where the Commissioner having found that a sum of money was in the hands of one assignee, directed it to be invested in the names of all three assignees; which, however, could not be done, as the money was not forthcoming; and it was held, that the Commissioner was not warranted in finding, by a subsequent memorandum, that the money was in the hands of all three assignees, and thereupon ordering them to divide it; and that the Court of Review had no jurisdiction to enter on the liability of the co-assignees to answer the consequences of trusting the assignee who made default. In the present case it is clear, that *Chatfield* alone was in possession of the fund, out of which the dividend was to be paid, and that *Sturch* had no funds whatever in his hands; and the Commissioners expressly declare that the dividend is to be paid out of the effects in the hands of *Chatfield*.

ERSKINE, C. J.—It was certainly imprudent in Mr. *Sturch* to have lain by and suffered this money to remain so long in the hands of *Chatfield*, his co-assignee, instead of seeing that it was paid into the bankers chosen by the creditors. It is, however, quite consistent with *Sturch's* liability, that *Chatfield* alone received the money. But Commissioners of Bankrupt, according to the usual practice, make the order of dividend on all the assignees; and in the present instance it is made upon *Chatfield* alone. It must therefore be clearly shown, that the order of dividend was made on

(a) 1 Dea. & Chit. 491.

only *one* of the assignees, instead of being made on the assignees generally. The *onus*, I think, lies on Mr. *Sturch* to prove that the alteration in the order of dividend was made before the Commissioners signed it.

1834.

Ex parte
Dawson
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Sir J. CROSS.—It does not appear, that the money, though received by *Chatfield*, was not at the disposal of the assignees generally; and it seems that the order of dividend, as originally framed, was on all the assignees.

Sir G. ROSE.—The question is, whether the alteration in the order of dividend was fairly made, or not; and if fairly made, then how far such alteration confined the original joint liability of all the assignees to the separate liability of *Chatfield*. The proceedings now come out of the hands of *Sturch*, the surviving assignee; and therefore we should have some evidence, that the alteration was made *bonâ fide* with the sanction of the Commissioners.

THE COURT ORDERED, that it should, in the first instance, be referred to Mr. *Gregg*, the deputy registrar, to inquire and state whether the alteration in the order of the Commissioners of the 27th March 1827 was made by and with the authority of the Commissioners, and under what circumstances; that further directions and costs should be reserved; and that the proceedings should be lodged with Mr. *Gregg*, for the purposes of the inquiry (a).

(a) And see *Ex parte Powell*, Mont. & M. 283; *Lingard v. Bromley*, 1 Ves. & B. 114; *Primrose v. Bromley*, 1 Atk. 89.

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Ex parte
Dawson
and others.

Westminster,
January 27.

The matter came again before the Court this day, Mr. *Gregg* having reported that the interlineations appearing in the order of dividend were made by two of the Commissioners before they signed it, and that the order itself was only signed by two Commissioners.

Mr. *Maclean*, for the petitioner, contended, that as Mr. *Sturch* had at one period taken an active part in the administration of the bankrupt's effects, the Court could not now notice any private agreement between him and *Chatfield*, the other assignee. In *Ex parte Booth (a)*,—where four persons were chosen assignees, and at the choice it was verbally agreed that one only should act, and notice was given to the bankers to the estate to pay the drafts of that one,—it was held, upon a dividend being declared, and the acting assignee having made default and absconded, that the other three assignees were liable for the payment of the dividend; as the creditors were not bound by any private arrangement between the assignees. So, in *Ex parte Healy (b)* it was decided, that the assignees were jointly liable for the acts of each other. In that case the creditor had failed to apply for the dividends for many years; and although there was no sufficient fund left of the bankrupt's estate to pay the creditors, yet it was held, that the surviving assignee was liable for the payment of the dividends, if his co-assignee had ever admitted the proof of the debt, unless it could be proved that the creditor had received them; and that the *onus* of the proof of payment lay on the assignee. The present case is distinguishable from that of *Ex parte Lear-*

(a) Mont. 248.

(b) 1 Deac. & Chit. 361.

mouth (a), which was cited by the other side in the former argument; inasmuch as in that case the assignees, whom it was sought to fix with the payment of the dividend, had never attended any meetings under the commission, and had applied to be discharged from the very beginning. If *Sturch* trusted too much to the responsibility of *Chatfield*, his co-assignee, it was his own misfortune, and the other creditors ought not to suffer from his imprudence. [Sir J. Cross. How do you prove, that the dividend in question was not paid to the petitioner?] In *Ex parte Healy* (b) the *onus probandi*, as to the payment of the dividend, was thrown upon the assignee.

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DAWSON
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Mr. *Montagu*, and Mr. *Pigott*, for the respondent, were stopped by the Court.

ERSKINE, C.J.—I am of opinion, that the petitioners in this case are, under all the circumstances, not entitled to the relief they ask against *Sturch*. There is no doubt that, generally speaking, money in the hands of assignees is considered in law as money held by them to the use of the persons among whom it is ordered to be divided; and that any creditor, whose dividends were unpaid, might formerly have brought his action against the assignees for money had and received to his use. The foundation of the claim of the party, here, is the order of dividend. Now it appears, that the order of dividend was not drawn up in the usual form, namely, that the Commissioners find a certain sum of money to be in the hands of all the assignees,

(a) 1 Deac. & Chit. 491.

(b) *Suprà*.

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Dawson
and others.

and accordingly direct them to divide the same among the creditors; but that the order stated, that the money to be divided was in the hands of *Chatfield* alone, and that Mr. *Sturch* and the other assignee, *Packer*, had neither of them received any portion of the bankrupt's estate and effects. It would seem, therefore, that the Commissioners considered *Sturch*, as having nothing to do with the dividend, but that they confined the directions for payment of it entirely to *Chatfield*. There are, however, several interlineations in the order, which are not signed with the initials of all the Commissioners; but there is no order on *Sturch* to pay the dividend. On the former occasion the Court referred it to the deputy registrar, to inquire whether the alteration in the order of the Commissioners was made with the authority of the Commissioners, and under what circumstances; and it has been found by Mr. *Gregg*, that the interlineations in the order were made by two of the Commissioners, and that the order itself was only signed by two. The order of dividend, therefore, is in itself defective, as wanting the signature of the third Commissioner; but if you take it as valid for any purpose, you must take it as valid for all purposes. Now it is expressly stated in the order of dividend, that *Chatfield* has a certain sum of money in his hands; and that he, and not *Sturch*, is directed to divide the same among the creditors, *Sturch* being entirely excepted from the order. Nevertheless, the petitioners pray that *Sturch* may be directed to pay the dividend under this order, although *Sturch's* liability was never contemplated by the Commissioners when they made the order of dividend. For these reasons, I think that we are bound to dismiss the petition.

Sir J. Cross.—The petitioners found their claim upon an order of dividend, the validity of which is altogether very questionable. But the point we have now to decide is, whether the petitioners can enforce this order, against *Sturch*; and I am of opinion that they cannot.

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Sir G. Rose.—Upon a petition for payment of dividends, the analogy which that proceeding bears to an action at law, which was the only remedy formerly possessed by the creditor against the assignees to enforce the payment of his dividend, ought to be followed as closely as possible. Now the order of dividend in this case being signed by only two Commissioners, if an action had been brought against the assignees by any creditor on this order, the assignees might have objected to it *in limine*, and the plaintiff must have been nonsuited. But, looking at the terms of the order, and construing it to be valid, the direction is, that *Chatfield* only should pay the dividend. Within the terms of the order, therefore, *Chatfield* is only chargeable. It was *prima facie* a fair case, that *Sturch* should be exempted from all liability; for that was the plain intent of the alterations made in the order of dividend. These alterations, however, having excited some suspicion, it was left to the registrar to ascertain under what circumstances the interlineations were made; and it now appears from his report, that they were made by the very same two Commissioners, who signed the order of dividend; and therefore the interlineations stand upon the same footing precisely as the order itself; if that is taken to be valid, therefore, the interlineations must be taken also to be a valid part of it. We have only to

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deal with the case, as if this petition was an action for money had and received against *Sturch*; and the order of dividend having found expressly that none of the money ordered to be divided was received by *Sturch*, but solely by *Chatfield*,—and that *Chatfield* alone was ordered to pay the dividend to the creditors,—the petitioners would have no right of action against *Sturch*, and have consequently no greater right to compel him to pay the dividend on this petition.

Petition dismissed.

Westminster,
Nov. 24,
1834.

Ex parte NEWTON.—In the matter of GOREN.

A bankrupt deposits with the petitioner, by way of equitable mortgage, an assignment which had been made to the bankrupt of a reversionary interest under a will; no notice of the assignment having been given to the executors either by the bankrupt, or by the petitioner:—*Held*, that the property was not within the order and disposition of the bankrupt, as reputed owner.

THIS was the petition of an equitable mortgagee of certain property, which had been assigned to the bankrupt by the legatees under a will, and the assignments of which the bankrupt had deposited with the petitioner for securing three several sums of 750*l.*, 199*l.*, and 97*l.* There were two deeds relating to the property:—one conveyed to the bankrupt a reversionary interest in a fourth part or share of 1200*l.* three per cent. consolidated annuities, expectant on the death of a party therein named, and also a reversionary interest in the like share of two several annuities of 30*l.*, together with certain shares in the residuary estate under a will therein specified; the other deed conveyed to the bankrupt the reversionary interest of certain shares of other legatees in the said sum of 1200*l.* consolidated bank annuities, and in three other annuities of 30*l.*, together with the shares of these legatees in the same residuary estate; which residue consisted wholly of certain houses at Chelsea, in the county of Middlesex.

The fiat issued on the 6th June 1834, and the memorandum of deposit was dated the 27th December 1830.

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Ex parte
NEWTON.

The petitioner prayed, that all the shares and interest of the bankrupt in the monies and property comprised in the indentures deposited with the petitioner might be sold, and for the usual order in cases of equitable mortgage.

Mr. *Armstrong* appeared in support of the petition.

Mr. *Bacon*, for the assignees, objected, that the petitioner had not given proper notice to the trustees and executors under the will, of the deposit of these deeds with the petitioner, and of his equitable interest in the property mentioned in the will; and therefore that the bankrupt must be taken to have had the order and disposition of it at the time of his bankruptcy. [*Erskine, C. J.* The bankrupt, having given no notice himself to the trustees, could not have had the order and disposition of this property.] In equity, where there is an equitable interest in a fund in Court, the party interested can have a stop upon the fund. [*Sir G. Rose.* The question is, what is the value of the interest of a party in an assignment of property of this description, who gives no notice of the assignment to the trustees or executors under the will.] [*Erskine, C. J.* Supposing the life, on which the reversionary interest depended, had fallen in before the bankruptcy, could the bankrupt have enforced his claim against the trustees? They might have said, you must prove your title to this property; and the bankrupt, not being able to produce the deeds by which it was assigned to him, —the deeds themselves being in the hands of the pe-

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tioner,—could have shown no title whatever.] The bankrupt might have availed himself of the assignments of the property to him, by exercising acts of ownership, the same as if he had the assignments in his own possession, and he would thus have become the reputed owner. He might with truth have said to the trustees, “ I am the legal owner of this property.”

ERSKINE, C. J.—The cases have, I think, already gone far enough, as to the doctrine of reputed ownership, where notice is omitted to be given of the assignment of a chose in action; and I confess that I am not inclined to carry them further. The only evidence here of any ownership of the bankrupt was the two assignments of this property by the parties interested under the will; and these documents were not in the hands of the bankrupt, but were deposited by him for a valuable consideration with the petitioner. The bankrupt, therefore, could not have availed himself of the assignments, without some gross fraud.

Sir J. Cross.—There may be a question, whether a *reversionary* interest comes within the clause of order and disposition. A policy of assurance on a life certainly does; and therefore perhaps, on the same principle, all reversionary interests may be likewise held to come within it. But I think, for the reasons given by his Honor the Chief Justice, that this property was not in the order and disposition of the bankrupt at the time of his bankruptcy.

Sir G. Rose concurred.

The Order was therefore made as prayed—
the costs to come out of the fund.

*

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ANONYMOUS.

IN this case the bankrupt had petitioned to reverse the adjudication, on the ground of having committed no act of bankruptcy.

Mr. *Montagu* now applied, on his behalf, that he might be at liberty to inspect the proceedings; but was not prepared with an office copy of the affidavit which had been filed in support of the petition.

Westminster,
January 13.
No application can be made in the matter of a petition, before an office copy is taken of the affidavit filed in support of it.

The COURT, for this reason, refused the application.

Ex parte SIDEBOTHAM.—In the matter of WILLIAM
BARRINGTON.

THIS petition came before the Court on the 14th July last (a), when an order was made, among other things, that the respondent should pay the costs, to be taxed by the proper officer of the Court. The costs had been since taxed by the deputy registrar, who allowed for the charge of an affidavit containing 136 folios, which had not been read upon the hearing.

Westminster,
January 13.
When an order is made on the hearing of a petition, that a party shall pay the costs, this includes the costs of an affidavit filed by the other party, although it was not read on the hearing of the petition.

Mr. *Bethell*, for the respondent, now moved, that the deputy registrar might be ordered to review his taxation, on the ground of having allowed for an affidavit, which was rejected on the hearing of the petition. The form, in which the order of the Court was drawn up, was, "Upon hearing the affidavits read." It is, therefore, a mere question of fact, as to what affidavits

(a) See 3 Deac. & Ch. 818.

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were, or were not, read; and if the affidavit referred to was not read, the registrar had no authority to allow the costs of preparing it. [*Erskine*, C. J. It appears from the registrar's notes, that the affidavit was not absolutely rejected, but that the Court said on the former occasion to the respondent's counsel, who complained of the affidavit containing impertinent matter,—“When the other side attempt to read the affidavit, then make your objection.”] We have two things, nevertheless, to urge in support of the present application: the objection was made, and the affidavit was withdrawn.

Mr. *Swanston* opposed the application.

ERSKINE, C. J.—In other Courts, I believe, it is the practice to specify in the order the different affidavits, on reading which the order is drawn up; but in this Court the usual course is to state in general terms, merely, “upon hearing the affidavits read.” The very point now urged before us was determined in *Ex parte Lucas* (a); where the Court decided, that when a petition is dismissed with costs, the costs are not to be limited to those merely of the affidavits that were read on the hearing of the petition,—for that, in general, all affidavits filed were entered as read. As the deputy registrar has therefore pursued in this instance the ordinary practice of the Court, this application cannot be granted.

Sir J. CROSS.—When the objection was made to this affidavit on the former hearing, the respondent's counsel should then have applied to the Court to dis-

allow the costs of preparing it, and not have lain by till the officer had taxed the costs in the usual way. The question is, whether the officer has done right, or not, in allowing the costs of the affidavit; and it appears to me, that he has acted according to the ordinary practice of the Court.

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SIDEBOTHAM.

Sir G. ROSE.—A man is not bound to read all the affidavits, which he files in support of, or in opposition to, a petition. The only question we have now to consider is, whether the registrar has rightly executed the order of this Court, as pronounced on the former hearing; and I see no ground for ordering him to review his taxation.

Motion refused, with costs.

Ex parte EDWARD WILSON.—In the matter of JAMES BUTTERWORTH.

Westminster,
January 13,
1835.

THIS was the petition of equitable mortgagees, for the sale of a cotton factory, and certain fixtures belonging to it, under the following circumstances:—

By indenture of mortgage, dated the 1st July 1831, made between the bankrupt of the one part, and *Clement Royds* of Rochdale, banker, of the other part, the bankrupt demised and assigned unto *C. Royds* certain plots of land, factories, mills, warehouses, erections and buildings, together with the steam-engines, and also all

A bankrupt, being the owner, as well as occupier, of a freehold cotton mill, gave the petitioners an equitable mortgage on it, "together with the steam-engines, and also all and singular other the moveable and fixed machinery, and steam-pipes then in, upon, about, and be-

longing to the said steam-mill and premises, or occupied or used therewith;" and the bankrupt continued in possession of the mill and fixtures up to the period of his bankruptcy. *Held*, that all parts of the machinery and fixtures, which were so attached to the premises as to be legally affixed to the freehold, were not to be considered as goods and chattels within the 72d section of the Bankrupt Act, and that the assignees had no right to them, as against the equitable mortgagees.

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and singular other the moveable and fixed machinery and steam-pipes then in, upon, about, and belonging to the said steam-mills and premises, or occupied or used therewith: To hold to the said *Clement Royds*, his executors, administrators, and assigns, for the term of 900 years, upon trust for securing the repayment of the monies then owing from the bankrupt to the said *Clement Royds*, or thereafter to become due, not exceeding, in the whole, 5,000*l.*, with interest at five per cent.; with a power to *Royds* to sell and dispose of the premises, for better realizing and securing the said principal monies, and interest.

In October 1831 the bankrupt applied to the company of proprietors of the bank of Liverpool (which was established under the provisions of the act of 7 *Geo.* 4. c. 46.) to take a transfer of the banking account then subsisting between him and *Royds*, by paying off the debt then due from him to *Royds*, and taking a transfer of the above mortgage. The bank acceded to this proposal, and accordingly paid off the debt due from the bankrupt to *Royds*, on security of this mortgage; and *Royds* thereupon, by direction of the bankrupt, delivered to the bank the indenture of mortgage, and the title-deeds relating to the premises therein comprised, and also signed and gave to the bank an undertaking in writing, in the following words, that is to say:—

“Rochdale, 22d Oct. 1831.—To the Directors of the Bank of Liverpool.—Gentlemen, As we have delivered to you, at Mr. *Butterworth*’s request, his title-deeds to his mills, buildings, and premises, lodged with us as a security, together with the mortgage from him to us,

we hereby engage to execute, upon request by you, such assignment or conveyance of the security and premises included in it, as you may require, and counsel may advise."

The bankrupt also at the same time signed and delivered to the Liverpool bank the following agreement in writing :—

" Memorandum of an agreement entered into on the 22d of October 1831, between *James Butterworth* of Rochdale, in the county of Lancaster, cotton-spinner, for himself, his executors, and administrators, of the one part, and *Henry Blundell Hollinshead*, *Thomas Case*, and *William Myers*, of Liverpool, esquires, (trustees on behalf of the Company of Proprietors of the Bank of Liverpool,) of the other part, witnesseth, that at the time of signing these presents, the said *James Butterworth* hath deposited with the said trustees the title-deeds and writings mentioned in the schedule hereunder written, in pledge as a running security to the said Company, and whether the same shall continue to consist of the present proprietors, or shall consist of new or different proprietors, and notwithstanding any and every change in the Company, for the due payment of all monies now or hereafter to be lent, advanced, or paid by the Company, to, for, or on account of the said *James Butterworth*, or now due, or hereafter to become due from him to the said Company, by any means or on any account whatsoever, and whether on his sole account or jointly with any other person whatsoever, not exceeding in the whole the principal sum of 7000*l.*, together also with interest at five per cent. per annum on such monies as aforesaid, to be charged from such times and in such manner as is usual among bankers;

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such payment of the monies hereby secured, and interest, to be made within one calendar month after notice in writing to be delivered to the said *James Butterworth*, or sent to his usual or last known address, through the post-office. The said *James Butterworth* is, whenever required by the Board of Directors for the time being of the said bank, at the expense of him the said *James Butterworth*, to execute a legal mortgage or mortgages of the premises comprised in the said deeds, to the trustees for the time being of the said Company, or to such other persons, or in such other manner, as the Board of Directors for the time being shall require; which mortgage or mortgages shall contain all such provisos for redemption, and other provisos, powers of sale, and other powers, covenants, and other clauses whatsoever, as the counsel of the said Company shall reasonably require, particularly a covenant on the part of the said *James Butterworth*, for himself, his heirs, executors, and administrators, for due payment of the principal monies and interest hereby secured, according to the provisions hereinbefore contained." The schedule then specified the deeds and writings that were deposited with the bank.

After entering into this agreement, the bankrupt continued to deal with the Liverpool bank until the time of his bankruptcy, and he received from the bank further sums of money on the security of the mortgaged premises. A fiat issued against him on the 10th February 1834, when there was due from him to the bank the sum of 4,600*l.*; after deducting from which sum the value of certain shares in the bank belonging to the bankrupt prior to his bankruptcy, and which the bank was entitled to retain, there still remained due

the sum of 4,200*l.*, and interest from the date of the bankruptcy.

The petition prayed for a sale of the premises comprised in the mortgage-deed of the 1st July 1831, together with the steam-engines, boilers, reservoir, and pipes communicating therewith, main-shafting, or gearing, with the wooden engine attached thereto, and the iron steam pipings and gas piping, set up and affixed upon various parts of the premises; and that the proceeds of the sale might be applied in satisfaction of the principal and interest due on the mortgage, in the usual manner.

The fixtures comprised in the mortgage consisted of the following particulars, that is to say:—Three steam-engines, with four steam-boilers, which boilers branched into and communicated with one another, the whole of the steam-engines and boilers being firmly built into the engine-houses and boiler-house, wherein they severally stood, with brick-work and iron-work; a large iron pipe, communicating across a passage from one of the boilers with one of the steam-engines, and firmly attached to the boiler and steam-engine respectively, and forming part thereof; an iron reservoir, communicating by means of an iron pipe with the boilers, for supplying them with water, the whole being firmly fastened together; iron main-shafting, or gearing, with wooden drums attached thereto, by which the first motion was communicated to the spinning machinery, and which main-shafting or gearing was firmly attached to the main beams by iron slings screwed and bolted to such beams; a continued series of cast-iron steam-pipes, communicating with the boilers, for heating the mills, and attached to the main-

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beams by iron slings fastened with bolts and screws; a series of gas-pipes, and fittings and burners, throughout the mills, the same being passed through the brick-walls and main-beams of the mills, and firmly attached thereto.

It appeared from the affidavits of witnesses filed in support of the petitioner, that the steam-boilers, steam-engine and reservoir, main-shafting, or gearing, with the wooden drums attached, and the iron steam-piping and gas-piping, were, according to the custom of trade in Lancashire, considered as fixtures belonging to and forming part of the freehold.

The assignees disputed the right of the petitioners to any part of these fixtures and machinery, except the steam-boilers, steam-engine, and reservoir; contending that the *main-shafting* and *gearing*, and all the *iron steam piping* and *gas piping*, being in the possession of the bankrupt at the time of his bankruptcy, belonged to his assignees.

Mr. *Koe*, and Mr. *Booth*, appeared in support of the petition, and cited the case of *Ex parte Loyd (a)*, in the matter of *Ogden*, as applicable to the present case, on one point expressly, and on the other, on principle. They also referred to *Boydell* and *M^cMichael (b)*; where, the lessee for years of a house, who was also possessed of the fixtures therein by separate purchase, having mortgaged his term with the fixtures, and afterwards become bankrupt, it was held, that his assignee, who removed and converted them, was liable, in trover by the mortgagee, to pay the value of them while fixed on the demised premises. [Sir *J. Cross*. It

(a) 3 Dea. & Ch. 765.

(b) 3 Tyrw. 974; S. C. 1 Cr. M. & R. 177.

is distinctly shown in other cases on this subject, that only the *working* machinery of a cotton mill belongs to the tenant, and the moving machinery to the landlord.] They were then stopped by the Court, who thought that the petitioner had made out a *prima facie* case.

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Mr. Swanston, and Mr. Anderdon, for the assignees. We contend that all the subsequent machinery beyond the engine-house, which contains the steam-engine, may be removed without injury to the freehold. It is sworn by witnesses of skill and experience in these matters,—that the steam-engine terminates with the fly-wheel shaft of the driving wheel, technically called the first-motion wheel, at which point the office of the engineer ends, and all the machinery beyond it is put up by the millwright, and forms no part of the steam-engine;—that the subsequent machinery is not cemented in any way to the shaft, but is screwed and bolted to pedestals, which are also screwed and let in to the walls, and might be removed by unscrewing, without any injury being done to the building;—and that the gas-pipes rested on steps not fixed to the floor or ground, but merely passing through the walls, without being affixed to them. There is no doubt that all these things must be considered goods and chattels; and then the question arises, whether they are not within the 72d section of the Bankrupt Act, as being in the possession, order, and disposition of *Butterworth* at the time of his bankruptcy, and whether that section is not, in this respect, (pursuant to the directions of the 135th section,) to be construed beneficially for creditors. Fixtures do not lose their character of goods and chattels, because they are affixed to the freehold; for notwithstanding they belong to the landlord, they are still to all intents

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and purposes goods and chattels. [Sir J. Cross. So are bricks and mortar, which are used to build a house.] There the bricks and mortar assume a new creation, by being converted into a messuage, and lose their original character of goods and chattels. The law recognizes a *messuage, ipso nomine*, as freehold property. In *Trappes v. Harter (a)*, it was decided that the machinery and utensils appertaining to certain calico printing works, having been affixed to the inheritance of the property for the purposes of trade only, in a place where, as such, they would have commonly been removed, and being, in fact, removable without injury to the freehold, were not to be taken as part of the inheritance, but as personal estate only, which passed to the assignees of the owners of the property, who had become bankrupt. There is no decision, which compels this Court to say, that a mortgagee has a right to fixtures, which may be removed without injury to the freehold. In this case, the bankrupt was the original owner of the property; and the cases dwell mainly on that point, in considering the question of reputed ownership. Thus in *Lingard v. Messiter (b)*—where the bankrupt had once been the owner of certain machinery, which was taken in execution by a creditor, and the creditor afterwards demised them at an annual rent to the bankrupt, who continued in possession of them until his bankruptcy—it was held, that this was *prima facie* evidence that the bankrupt continued in possession as owner, there being no evidence of the notoriety of the exchange of property, and that the property therefore passed to his assignees. [Sir J. Cross. The question is here, whether it was the intention of the parties that the machinery and fixtures

(a) 3 Tyrw. 603; Crompt. & M. 153.

(b) 1 B. & C. 308.

were to be mortgaged along with the mill.] Whatever the intention was, the distinction of this case is, that the bankrupt was the original owner of the machinery; this brings the case within the doctrine of *Lingard v. Messiter*. [Sir J. Cross. The bankrupt was also the owner of the mill, and continued in possession of it as reputed owner; and yet that circumstance does not bring the case within the 72d section of the Bankrupt Act.] There is no reason, however, why credit should not follow the reputed ownership of the machinery in this case; when there is the additional circumstance of the owner himself having annexed it to the freehold. Nothing can affect the reputation of ownership, but a notoriety in the change of the property; and in this case the reputation of ownership has never been displaced. This is not like the case of *Hubbard v. Bagshaw* (a); which was decided on the principle, that the possession of the steam-engine, like the possession of the mill itself, did not necessarily carry with it the reputation of ownership; nor is it like the case of *Ex parte Loyd* (b), which went on the ground that the articles there were to be considered fixtures. Now, though there is a conflict of testimony in this case on some material points, yet it is clear that these things might be removed without injury to the freehold. They ought, therefore, to be considered as no fixtures at all, nor as ever having lost the character of goods and chattels. If so, then this is precisely the case of the mortgage of a house with the furniture in it; where the furniture would pass to the assignees, if in the possession of the bankrupt as reputed owner. [Sir J. Cross called the attention of the Court to this fact, that the

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(a) 4 Sim. 236.

(b) *Suprà*.

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words of the mortgage to *Royds* did not include the gas machinery, but only that appertaining to the steam-engine.

ERSKINE, C. J.—The judges who decided the cases of *Boydell v. M^r Michael (a)*, and *Trappes v. Harter (a)*, were of opinion that nothing could be considered in the light of goods and chattels, that was affixed to the freehold, unless it could be brought within the terms of the 72d section of the Bankrupt Act. If the fixtures in this case had been affixed by the bankrupt in the character of *tenant*, it might then have been important to look into the cases that have been cited on the part of the respondents. But there is a wide distinction between those cases and this; for here the bankrupt put up the machinery as the *owner* of the mill, attaching it as a fixture to his own property. The general rule is, that what is affixed to the freehold becomes part and parcel of the freehold. Some exceptions were afterwards made in favour of trade, which enabled a tenant to remove things put up by him for the purpose of carrying on his business, so as he removed them before the expiration of his term. But this is not a case between landlord and tenant; and I believe it has never been decided, that where the owner of the freehold erects different fixtures on his property, they are not then to be considered as annexed to the freehold. In this case, therefore, the bankrupt being the owner of the cotton mill, when the steam-engine and other machinery was erected by him, these things would consequently lose their character of goods and chattels, after they were so attached to the free-

(a) *Suprà*.

hold. It is not necessary to prove, that it is an inva-
riable custom for the owner of a cotton mill to let it
fitted up with machinery to a manufacturer, in order
to rebut the presumption of the apparent ownership of
the tenant; but it is sufficient to prove, that cotton mills
are occasionally so let;—as in the case of horses and
carriages. The only question in this case is, whether
the machinery was so affixed to the buildings, as to be
legally attached to the freehold. My present impres-
sion, from the facts already stated, is, that it was so
affixed. I should wish, however, to read through the
different affidavits before the order is drawn up, for
upon that fact the whole question must turn. But if I
see nothing in the affidavits to induce me to change my
opinion, I think the petitioner will be entitled to all
those things included in the order for sale.

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Sir J. Cross.—There is a good deal of complexity
in this case. It is, however, not disputed, that down
to the time of the bankruptcy, all the machinery and
steam pipes, whether fixed or movable, were, according
to the terms of the mortgage deed, the property of the
mortgagees. But it is contended that, at the time of
the bankruptcy, all the movable machinery became
then the property of the assignees under the provisions
of the 72d section of the Bankrupt Act, because it
might be detached without injury to the freehold, and
therefore partook of the nature of other goods and
chattels in the order and disposition of the bankrupt
at the period of his bankruptcy. But the argument
founded on this assumption—that the machinery could
be *detached* without injury to the freehold—shows
that it was actually *attached* to the freehold. The
articles of which the machinery was composed were

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indeed all so situated and constructed, that they would have passed by the mortgage by operation of law, although they had not been mentioned in the deed. And with respect to the operation of the 72d section of the Bankrupt Act, these fixtures were left in the possession of the bankrupt for the better enjoyment of the freehold, and not as goods and chattels. It has been stated, that part of this machinery was erected by the engineer, and part by the millwright; and that the former portion of it is considered only as annexed to the freehold. But the rights of parties are not to be determined by the particular class of workmen who have done the work. The machinery, which is actually attached to the building, cannot come within the terms of the 72d section, which speaks only of "goods or chattels." Then with respect to the gas-pipes, suppose a man sells a house in London, which is supplied with water by means of water-pipes, would not these pipes go with the house? Then why are not the gas-pipes to pass with the freehold of this cotton mill? It is quite a distinct question, whether a tenant, who had erected these things for the purpose of carrying on his trade, could remove them or not. Here they were erected by the owner of the freehold, and there is no question as between landlord and tenant, but merely whether they are to be considered as goods and chattels within the 72d section of the Bankrupt Act.

Sir G. ROSE.—If the articles in question were affixed to the freehold of the buildings in which they were erected, it becomes then quite unnecessary to consider the other point that has been raised, as to their being in the order and disposition of the bank-

rupt at the time of his bankruptcy. It is very important therefore to ascertain precisely, whether they were so affixed to the freehold or not. Now, as far as the evidence goes, this seems quite sufficient to displace the title of the assignee to these fixtures, as goods and chattels, under the 72d section of the Bankrupt Act. I see no reason for altering the opinion I expressed in the case of *Ex parte Austin*(a), that where fixtures are capable of being removed, as between landlord and tenant, without injury to the freehold, they are then within the order and disposition of the bankrupt, if they continue in his possession at the time of his bankruptcy; but if they are so affixed, that they cannot be removed without injury to the freehold, in that case they do not come within the meaning of the 72d section. The proper way, in my opinion, to look at this case is, to consider it as if the bankrupt had been a tenant of the property, and had erected these fixtures in the character of tenant—and then to put the question, yes or no, whether he had a right to dis-sever the things which he had so affixed during his tenancy. I cannot help taking the liberty of saying, that the principle on which some of the cases on this subject have been decided, has not been very clearly explained, with reference to fixtures being considered goods and chattels within the doctrine of reputed ownership. It is difficult to determine precisely what fixtures are, and what are not, goods and chattels, within the terms of the 72d section. When a tenant becomes bankrupt, who has erected fixtures which may be severed without injury to the freehold, and he has therefore a right to remove them before the determina-

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(a) 1 Dea. & Chit. 207.

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tion of his tenancy, then there is no difficulty in the point. But when the fixtures are erected by the owner of the freehold, who becomes bankrupt, they will then pass to the assignees by the operation of the bargain and sale of the bankrupt's freehold property. In this case, therefore, as the bankrupt was not the tenant of the property, but the owner of the freehold, when he erected the fixtures, they would have passed to the assignees with the freehold, but for the previous mortgage to *Royds*. This mortgage, however, includes the fixtures *eo nomine*; and I think they would have passed to the mortgagee as part of the freehold, even if they had not been named in it.

January 23.

ERSKINE, C. J. stated this day, that he had carefully read the affidavits, and that the Court were satisfied, that the machinery was so attached to the premises, as to be part of the freehold, and could not therefore be considered as goods and chattels, within the clause of reputed ownership in the Bankrupt Act.

May 1, 1835.

The Court will not vary the minutes of a former order, which has been pronounced more than three months, except on a petition for rehearing.

The matter came on this day again before the Court, by way of supplemental petition; in which the petitioner complained, that the assignee had put up to sale the gas-piping and apparatus, notwithstanding the petitioner gave him notice that he objected to the sale, and should hold him liable for the consequences. The petitioner alleged, that by the disseverance of this machinery from the buildings to which it was attached, damage had been occasioned to the property to the amount of 310*l.*; and that the machinery itself

also sold for less than it would have done if it had not been dissevered, and had been sold along with the mill; and that the whole value of the mill, together with all the fixtures and machinery, was insufficient to satisfy the petitioner's debt. The petitioner prayed, therefore, that the assignee might be held accountable to him for the sum of 310*l*.

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Mr. *Koe*, and Mr. *Booth*, appeared in support of the petition.

The COURT thought, however, that the petitioner had no right to complain of any damage done to the premises by the removal of the machinery, when he could not know, for a certainty, that the premises when sold would not satisfy the amount of the money due on the mortgage. They therefore ordered the matter to stand over generally until after the whole property was sold.

Mr. *Koe* then applied for an amendment of the minutes of the former order, by inserting a direction that the costs of the assignees should come out of the general estate, instead of out of the produce of the sale, nothing having been said about the costs of the assignees on the former hearing.

The COURT, after conferring with the Registrar, said, that the minutes were drawn up according to the usual practice, which was, that the assignees should have their costs out of the produce of the sale; and that after so great a lapse of time, it was rather too late to move to vary the minutes of the former order

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on a question of costs; for that in deciding on any such variation, the Court ought to have its attention called to all the facts of the case, which could not properly be done except on a petition for rehearing; and that a petition for a rehearing would not lie for a mere question of costs.

The costs of both parties occasioned by this application were ordered to be paid out of the fund.

Mr. *Swanston*, and Mr. *Anderdon*, on the part of the assignees, then moved to vary the minutes of the former order, by introducing the words "after deducting any other securities the petitioners might hold," before the words containing the direction, that after the application of the proceeds of the sale of the mortgaged property, the petitioners should be allowed to prove for the deficiency.

Mr. *Koe*, and Mr. *Anderdon*, *contra*, contended, that it was wholly unnecessary to insert this direction in the order, as the Commissioners would take care that the petitioners should not prove for any debt, until they had realized, or deducted the amount of, the securities they held for any portion of the debt.

The COURT said, however, that as the minutes of the order originally stood, it was very probable that the Commissioners might think it imperative on them to admit the petitioners to prove for the amount of the deficiency of their debt, which was unsatisfied by the proceeds of the sale of the mortgaged property, without deducting the value of any other securities.

Upon this intimation of the opinion of the Court, it

was agreed by the counsel for both parties, that the order should be framed, so as to adopt the deduction mentioned in the petition, of the value of the Bank shares; and that it should direct, that the petitioners should not be allowed to prove for any deficiency, without deducting the value of any other security.

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The ORDER, as finally settled, was as follows :—

That the Company of Proprietors of the Liverpool Bank be declared to be equitable mortgagees of the premises comprised in the mortgage deed of the 1st July 1831, and the memorandum of agreement of the 22d October 1831, together with the steam-engines, boilers, reservoirs, and pipes communicating therewith, main-shafting or gearing, with the wooden engines and drums attached thereto, and the iron steam-piping and gas-piping set up and affixed in and upon the said premises. That it be referred to the Commissioners to take an account of the principal and interest due to the Liverpool Bank in respect of their said security, deducting the value of the Bank shares, to be settled by the Commissioners. That the premises should be sold, together with such part of the fixtures as had not already been sold, and that the assignees should have the conduct of the sale. That the proceeds arising from such sale, or from any previous sale of the fixtures, should be applied, first, in payment of the expenses of the sale hereby directed, and of the proceedings incident thereto, and the costs of the petitioners and the assignees occasioned by this petition, and

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then in payment of what should be found due to the Liverpool Bank; and that the surplus, if any, be paid over to the assignees; but if the proceeds should be insufficient to satisfy the debt of the Bank, then the Bank might prove for the deficiency, after deducting the value of any other security held by them on account of their said debt.

*

Westminster,
Jan. 14.

Ex parte PLANT.—In the matter of BUTTERWORTH.

By a clause in the deed of settlement of a Banking Company, it was stipulated that the Company should have a lien on the shares of such proprietors as were customers and indebted to the Bank, and that no share should be transferred without the consent of the directors; and an abstract of these provisions was indorsed on the certificate of the share held by each proprietor.

The bankrupt, at the time of his bankruptcy, was the owner of 30 of these shares, and had in his possession the certificates of ownership thus indorsed, being then

largely indebted to the Bank for advances:—*Held*, that these shares did not pass to his assignee under the clause of reputed ownership in the Bankrupt Act, so as to defeat the lien of the Bank, which had been provided for in the deed.

THIS was a cross petition of the assignee in the same bankruptcy, as in the last case. It stated, that *Butterworth*, the bankrupt, was the owner of 30 shares in the capital stock of the Bank of Liverpool, and that at his bankruptcy the Bank claimed to appropriate the value of those shares in part liquidation of his debt, under a clause in the deed of settlement of the Company, which gave to the Bank a lien on all shares of proprietors, who were customers and indebted to the Bank, for the amount of each proprietor's debts, and a right to declare them forfeit and sell them, and appropriate the proceeds. It was also further provided, that no share of any proprietor should be transferred, without the consent of the directors of the Bank. The petitioner contended, that these shares were in the order and disposition of the bankrupt at his bankruptcy, on the ground that he had then the certificates of ownership of the shares in his possession, which certificates were still in the possession of his assignee.

It appeared, however, that an abstract of the clause in the deed of settlement was indorsed on these certificates; and that the bankrupt was at the time of his bankruptcy largely indebted for advances made to him by the Bank.

The prayer was, that the petitioner, as such assignee, might be declared entitled to the shares for the benefit of the estate of the bankrupt, free from any lien or charge of the Liverpool Bank; and that if any order should be made on the last petition of *Ex parte Wilson*(a), giving the whole or any part of the relief thereby prayed, it might be on the terms, that the petitioner *Wilson* should relinquish the claim of the Liverpool Bank to retain all or any part of such shares; and that all proper directions might be given for enabling the petitioner to sell and dispose of the shares; and that the accounts prayed by the petition in *Ex parte Wilson* might be taken, if at all, without reference to the shares, and without deducting the amount or value thereof from the amount which should be found owing from the Bank to the bankrupt.

Mr. *Swanston*, and Mr. *Anderdon*, appeared in support of the petition.

Sir G. ROSE.—This is a claim by the assignees adverse to the petitioners in the case before the Court yesterday of *Ex parte Wilson*(a), and is one with which this Court cannot deal, unless the other side submit to our jurisdiction.

Mr. *Koe*, and Mr. *Booth*, for the respondents, agreed to abide by any order the Court might make.

(a) See *ante*, p. 143.

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Mr. Swanston, and Mr. Anderdon. The bankrupt being the proprietor of 30 shares in the Liverpool Bank, on which he had paid a deposit of 10*l.* per cent., and his name appearing in the books of the Company, as the owner of these shares at the time of his bankruptcy, the shares must be taken to have been in the order and disposition of the bankrupt, within the meaning of the 72d section of the Bankrupt Act, and, as such, to have passed to his assignees. The respondents rely on the clause in the deed of settlement of the Company, and the indorsement on the certificates delivered to the bankrupt; the purport of which is, that the shares of each proprietor shall be liable to the debts of the Company, and subject to a lien for the amount of the debts due to the Company from such proprietors as kept an account with the Bank. But notwithstanding the deed of settlement, and the indorsement on the certificates, there is no pretence for saying, that the bankrupt was not, at the time of his bankruptcy, the reputed owner of these shares. The Company made a return to the Stamp-Office, according to the requisitions of the 7 *Geo. 4. c. 46.*, of the names and residence of all the proprietors of the Bank, which return was verified on oath, and includes the bankrupt's name as one of the proprietors. The return to the Stamp-Office is therefore much more to be relied on as evidence of ownership, than the indorsement on the certificates to the contrary; for the one is only a private instrument, while the other is a public document verified on oath. The indorsement on the certificates is not sufficient to do away with the presumption of ownership. Whatever was due from the bankrupt *as a partner*, his share would be of course subject to a lien of the partnership; but not if the debt

accrued on his private account. [Sir J. Cross. If one partner owes a debt to the partnership, is not that a partnership transaction ?] It is not a debt, it is submitted, owing by him *as a partner*; and a partnership lien cannot be extended beyond partnership debts. This case must be looked upon as in the nature of a mortgage of the shares by the bankrupt to the Company, while he was permitted to be the reputed owner of them; and it is settled by the case of *Ryall v. Rowles*(a), that where a mortgage of goods permits a bankrupt to continue in the possession of them up to the time of his bankruptcy, he has no lien on them against the assignees. [Erskine, C. J. Is not the indorsement on the certificates of these shares quite decisive of the question? Take the case perfectly independent of any partnership. There is a condition on the face of the very document, which is the symbol of ownership, stating that the shares of each proprietor shall be liable to the lien of the Company, in respect of any debt owing by him to the Company. In the case of *Ryall v. Rowles*, there was no contract giving an express lien to the mortgagee.] The indorsement on the certificates amounts to nothing more than an intimation of a mere possible liability, not of any existing debt due to the Company from the bankrupt. This will not therefore prevent the doctrine of reputed ownership from attaching in this case. The directors of the Company never dealt in any manner with these shares, which were left in the order and disposition of the bankrupt as the reputed owner. There are, indeed, no less than three indicia of ownership which can be relied upon in this case,—1st. the books of the Com-

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(a) 1 Ves. 348.

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pany, in which the bankrupt's name appears as the proprietor of these shares,—2dly. the certificate delivered by the Company to the bankrupt, and remaining in his possession at the time of his bankruptcy,—and 3dly. that which is the most important, the return to the Stamp-Office of his name as a proprietor, verified upon oath. In *Nelson v. The London Assurance Company*(*a*),—where a director of the Company assigned his shares to the Company, in order to secure a debt due from him on his private account, and empowered the Company to direct the treasurer to retain the dividends, and sell his shares for the payment of his debt—but the power given to the Company had not been exercised, and his shares still remained in his name in the Company's books,—it was held, that on the bankruptcy of the director the shares passed to his assignees, as being in his order and disposition at the time of his bankruptcy. The facts of that case are stronger against the claim of reputed ownership than those of the present; as the Company had not merely a lien, but an actual assignment of the bankrupt's shares.

Mr. *Koe*, and Mr. *Booth*, for the respondents, were stopped by the Court.

ERSKINE, C.J.—The real object of this petition is, to obtain an order of the Court, declaring that the Banking Company are not entitled to these shares, and that they must deliver them up to the bankrupt's assignees. The claim of the assignees is founded on the 72d section of the Bankrupt Act, which declares, that “if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true

(*a*) 2 Sim. & S. 292.

owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the Commissioners shall have power to sell and dispose of the same for the benefit of the creditors." It has been argued, that as the bankrupt at the time of his bankruptcy was owner of 80 shares in the Liverpool Bank, his assignees were entitled to them under the provisions of this section of the act of parliament; and that the Company have no lien on them for any debt due from the bankrupt. That the bankrupt must be considered a partner in the Bank is clear, from looking at the words of the 7 Geo. 4. c. 46. for regulating the co-partnership of bankers; for that statute expressly designates the shareholders in a banking establishment as partners, and draws a distinction between those who are members of a corporation, and those who are members of a partnership firm. It follows, therefore, that the Bank would have a lien on the bankrupt's shares for contribution to any loss, or for payment of any partnership debt. But then it is said, that as the bankrupt dealt with the Bank in his private capacity, any debt which arose out of such dealing cannot be considered as a partnership debt. But there is an express contract contained in the 9th article of the deed of settlement, that there shall be a paramount lien of the Bank on the shares of all the proprietors, who might be customers and indebted to the bank. It is quite clear, that at the time of the bankruptcy of *Butterworth* the Company had a lien on the shares which he then held in the Bank. Then did his bankruptcy deprive them of that lien? Taking it for granted that this species of property comes within the

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meaning of the 72d section of the Bankrupt Act, still, if *Butterworth* had not, at the time of his bankruptcy, the power to dispose of these shares,—and it is obvious that he had not,—then the case does not fall within the provisions of that section. It has been contended, that the bankrupt must be held to have been the reputed owner of these shares, on three distinct grounds, namely, 1. That his name appeared as the owner of them in the books of the partnership : 2. That he was in the actual possession of the certificates, declaring him to be such owner : and 3. That his name was inserted as one of the proprietors in the return to the Stamp-Office. But the entry in the books of the co-partnership must be subject to the stipulations contained in the deed of co-partnership, and the same reasoning applies to the return made to the Stamp-Office. With respect to the certificates,—the very conditions on which the bankrupt held these shares, were set out on the face of those instruments; and therefore any purchaser would have had notice of the terms on which the bankrupt held the shares, and that the bankrupt could not transfer them, without giving previous notice to the Bank. There is a distinction between this case, and that which has been cited, of *Nelson v. The London Assurance Company*(a); inasmuch as in that case no order of the directors was necessary for the transfer of the shares; but here there was an express stipulation that no shares should be transferred, without the consent of the directors; and this appeared in the indorsement on the certificates. It would be manifest, therefore, to any person who might have dealt with the bankrupt for these shares, that the directors of the Company were clothed with the power of withholding their

(a) 2 Sim. & S. 292.

consent, and of thus preventing any effectual transfer. Under all the circumstances of this case, it seems to me, that the bankrupt was not the reputed owner of the shares, within the meaning of the 72d section of the Bankrupt Act; and that this petition must therefore be dismissed.

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Sir J. CROSS.—It was matter of surprise to me, I confess, that this petition should ever have been presented; and nothing that has been said to-day has in any way tended to remove that impression. The assignees say,—our interest in the partnership, in which the bankrupt was concerned, is the amount of what the bankrupt brought into the partnership. Such a principle as this, in estimating the claim by the assignees of a bankrupt partner, I never heard of before. That the assignees of one of several partners may, in the event of his bankruptcy, claim the whole capital of the bankrupt partner, without being liable to the partnership claims, seems to be contrary to every principle of reason and justice. Great stress has been laid on the return to the Stamp-Office, under the provisions of the statute of 7 Geo. 4. c. 46. But what is the real intention of that act? Merely, that every banking company of more than six persons shall give the public notice of the parties engaged in the concern. I see nothing whatever in this case, why it should differ from the case of an ordinary partnership. The assignees say, that the bankrupt was reputed owner of some interest or other in the establishment of the Liverpool Bank. Why every trader who is engaged in a partnership with others, may be called the reputed owner of his own share in the partnership. But that does not give him a right to take his share out of the concern, without discharg-

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ing the partnership liabilities. With respect to the certificates relating to these shares, I think the provisions of the 62d section of the Bankrupt Act do not relate to a document of that description. And as to the return made to the Stamp-Office, which the petitioner dwells so much upon,—it appears to me a most unreasonable mode of arguing, that because his name was put up there in a notice as one of the partners in the Bank, he must at all events continue a partner until that notice was pulled down. That notice could not affect the right of any purchaser of the partnership property, nor operate so as to deceive any person who dealt with the bankrupt. For these reasons, I am of opinion, that there is no ground for this petition.

Sir G. ROSE.—It is hardly necessary for me to say a word on this petition, except for the purpose of stating, that a delusion under which I laboured at the outset is now entirely removed. It seemed to me in the first instance, that there might be some difficulty in refusing to accede to the prayer of this petition. But looking at the provisions of the act of parliament, under the authority of which this Banking Company was established, it appears to me, that by the terms of that act this association must be considered, to all intents and purposes, a partnership. Nor do I see any thing in the deed of settlement, that can put this Company upon a different footing from any other trading company. In what manner the assignees would be entitled to claim against the other members of the Bank, in respect of the bankrupt's share in the joint debts, is not the question here. The assignees found their claim upon the certificates, and deal with the bankrupt's share in this Banking Company, as if it was an assign-

able interest. The mode in which they shape their case is, not as claimants of the bankrupt's joint interest in the partnership, but of a separate interest of the bankrupt in the partnership. The assignees, therefore, take the interest of the bankrupt with all the incidents relating to the shares, and subject to all the restrictions contained in the deed of settlement. I therefore think, that this petition should be dismissed with costs; which was

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Ordered accordingly.

Ex parte EDWARD TURNER and another.—In the matter of ALEXANDER KENNETH MACKENZIE and EDWARD ABBOTT.

THIS was a petition by two creditors, who had proved against the separate estate of one of the bankrupts, to expunge a proof made on behalf of the joint estate against such separate estate, under the following circumstances:—

On the 23d July 1813 a joint commission was issued against *Mackenzie* and *Abbott*, who were in co-partnership as merchants from the year 1811 to July 1813. *Mackenzie* had previously been in business, and had failed, and at the commencement of the co-partnership was indebted to various persons. According to the terms of the partnership, each partner was authorized to draw sums from time to time from the funds of the concern, by way of maintenance, amounting to the yearly sum of 700*l.*; but in December 1812 *Abbott* discovered that *Mackenzie* had with-

Westminster,
Nov. 23, 1833.

Proof cannot be made by the joint estate against the separate estate, except in the case of a fraudulent abstraction from the joint funds by one of the partners; and not then, if there has been any waiver of the tortious act by the other partner, so as to reduce it to a matter of contract.

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drawn from the co-partnership funds, over and above the sum he was so authorized to draw, large sums of money for his own private use and benefit. Upon this discovery being made, *Abbott* remonstrated with *Mackenzie* upon the great impropriety of his conduct, when he positively assured *Abbott* that he would replace the amount as soon as assets of his private estate should come to hand, which he was shortly expecting from the Baltic, West Indies, and other parts. *Mackenzie* went afterwards to the Island of Teneriffe, to look after some property consigned to the partnership in that island; and during his absence, his wife and family being in great distress, *Abbott*, from motives of humanity, allowed his wife small sums of money for the subsistence of herself and family, but not from any idea that either herself, or her husband, had any right to claim these sums of money from the partnership, nor with any intention of waiving the right of him, *Abbott*, to the restitution of the amount so improperly abstracted from the partnership funds. The amount, however, was never replaced by *Mackenzie*.

It was sworn by a clerk of the bankrupts, who had been with them from the commencement of their partnership to the date of the commission, that after giving credit to *Mackenzie* for various sums of money paid by him into the partnership account, he had drawn therefrom the sum of 3015*l.* 16*s.* 9*d.*; and that (after deducting from this the sum of 1458*l.* 6*s.* 8*d.*, the amount of what he had a right to draw from the 25th June 1811, the date of the commencement of the partnership, up to the 23d July 1813, the date of the commission,) there remained the sum of 1557*l.* 10*s.* 1*d.* overdrawn; that part of the sum of 3015*l.* 16*s.* 9*d.* con-

sisted of three bills of exchange of 1000*l.*, 1000*l.*, and 700*l.*, upon Messrs. *Graham*, belonging to the partnership; which bills had been discounted by *Mackenzie* in the month December 1812, and the proceeds applied by him to his own private account. And the deponent stated his belief, that these three bills were drawn without the knowledge or consent of *Abbott*.

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Upon this statement of facts deposed to by *Abbott*, and by the clerk, Mr. Commissioner *Fane* admitted a proof on behalf of the partnership estate of *Mackenzie* and *Abbott*, against the separate estate of *Mackenzie*, for the sum of 1557*l.* 10*s.* 1*d.*

It was alleged by the petitioners, however, against the admission of this proof, that the account of *Mackenzie* with the partnership, on which the balance of 1557*l.* 10*s.* 1*d.* arose, embraced the entire period of the partnership, and comprised all the sums drawn by him during that period, as well as the sums which he paid into the credit of his account. That all the transactions comprised in such account were regularly entered in the partnership books, from time to time, as they took place, and such books were, at all times during the existence of the partnership, open to the inspection of *Abbott*, who was well aware of the state of the account. That in December 1812, when the balance of the co-partnership account was in favour of *Mackenzie*, he drew out and appropriated to his own use the three bills of exchange for 1000*l.*, 1000*l.*, and 700*l.*, whereby the balance was turned against him, and continued so till the termination of the partnership. That *Mackenzie* did not in any way disguise or conceal from the knowledge of his partner, that he had drawn out the bills, and the same were immediately and

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regularly entered to his debit in the books of the partnership. That although *Abbott*, in December 1812, remonstrated with *Mackenzie* upon his overdrawing his account, yet he afterwards acquiesced, and even directly sanctioned the same course of dealing with the partnership funds. That during the months of February, March, and April following, *Mackenzie* continued to draw out various sums of money, amounting in the whole to 450*l.* 3*s.* 7*d.*, which were regularly entered in the partnership books, and were so drawn out with the knowledge of *Abbott*, who never took any steps to prevent a continuance of such over-drawings, and never expressed any disapprobation on the subject. That the advances made by *Abbott* to *Mackenzie's* wife were subsequent to the over-drawing in December 1812, and amounted in the whole to 140*l.*,—having been all made in the month of July 1813, and the last, (which amounted to 100*l.*,) on the 23d July 1813, the day on which the commission issued. The petitioners insisted, that *Abbott* had been thus instrumental to the continuance of the same course of dealing with the partnership funds, as had taken place in December 1812; and that neither the over-drawings in December 1812, nor the subsequent over-drawings, were provable against the separate estate of *Mackenzie*, to the prejudice of his separate creditors; and consequently that the balance of 1557*l.* 10*s.* 1*d.*, which formed the aggregate of such over-drawings, was not provable against his separate estate, until all his separate creditors were fully satisfied.

The petitioners therefore prayed, that the proof of 1557*l.* 10*s.* 1*d.*, so made on behalf of the partnership estate against the separate estate of *Mackenzie*, might

be expunged; or that so much of such proof, as consisted of sums drawn out by *Mackenzie* subsequently to December 1812, and of the sums paid to *Mackenzie's* wife, might be expunged.

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It appeared, that the sums subtracted by *Mackenzie* were not at the time entered in the partnership books; but that the entries were made by the clerk, subsequent to the discovery by *Abbott*, from loose papers and entries in the rough day-book, and from the recollection that the clerk had of the transactions,

Mr. *Swanston*, and Mr. *J. Marshall*, appeared in support of the petition. The proof in this case was admitted by the Commissioner—contrary to the general principle, that one partner cannot prove against the separate estate of another—upon the assumption, that the debt was incurred by a fraudulent abstraction by *Mackenzie* from the partnership funds. The Commissioner has in this instance drawn a wrong conclusion from the facts before him. For, looking at the deposition of *Abbott* alone, it is clear that he subsequently sanctioned *Mackenzie's* conduct, and thereby converted that which, for argument sake, might be admitted to be a fraudulent abstraction from the partnership funds, into a mere matter of contract. It is stated in *Abbott's* deposition, that when he remonstrated with *Mackenzie* on the subject, it was agreed between them, that the money so improperly abstracted should be replaced out of that share of the profits, to which *Mackenzie* would be entitled by the terms of the partnership. But the case may be carried much further; and it may be not unreasonably contended, that there was in fact no fraudulent conduct on the part of

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Mackenzie at all. For it appears, that in the partnership books there was a regular entry from time to time made of these transactions, to which *Abbott*, the partner, as well as the managing clerk, had free access. The conduct of *Mackenzie* must therefore be taken to have been with the knowledge, and consequently with the virtual assent, of his co-partner. Coupled with this transaction, when the subsequent advances made by *Abbott* to Mrs. *Mackenzie* are considered, the charge of fraud must be regarded as perfectly untenable; and therefore this proof by the joint against the separate estate, which can only be supported on the ground of fraud, must be expunged.

ERSKINE, C. J.—In *Ex parte Smith*(a), Sir J. Leach expressed his opinion, that if one partner be entrusted with the entire management of the partnership concern, and he withdraw monies for his separate use, which he duly enters in the partnership books, this is not a fraud which will entitle the joint estate to prove against the separate estate. That case is certainly very like the one now before the Court.

Mr. *Montagu*, and Mr. *Purvis*, for the respondents. Looking at the plain equity of this case, it cannot be doubted that the proof ought to be retained on the proceedings; because if the fact of the abstraction be established,—and here it is uncontroverted,—then it is manifest, that the separate estate has received a benefit to which it was not entitled, to the prejudice of the joint estate; and *qui sentit commodum sentire debet et onus*. There is a general rule, it is admitted, somewhat contrary to this proposition, and rather difficult to be

(a) 1 G. & J. 74.

reconciled in all cases with natural justice; namely, that if one partner applies the partnership funds to his own use, his co-partners cannot prove against his separate estate, in competition with his separate creditors, unless they make out a case of fraud. Where fraud, however, is established, the current of authority has always been, that a proof may be maintained; and within this principle the present case must fall. In *Ex parte Harris* (a), it was decided that proof might be made against the separate estate, in respect of funds fraudulently drawn out of the general stock by one of the partners,—that is, against the articles of partnership, and without the express or implied authority of the other partner. That case certainly lays down this qualification,—that if the abstraction take place with the knowledge, consent, privity, or *subsequent approbation* of the other partner, proof is then inadmissible. But the circumstances here show nothing like an act amounting to a *subsequent approbation*, and still less any prior knowledge, consent, or privity; for nothing whatever has been done by *Abbott*, which can purge the original fraud on the part of *Mackenzie*. If the subtraction of the bills in this case had been at the time openly entered in the said books, that might have raised a presumption that *Mackenzie* had no fraudulent intention; but no such entry was made, nor had *Abbott* any means of knowing of his partner's conduct, until just before the occasion when he remonstrated with him on the subject. But it is contended, that the conduct of *Abbott*, after the discovery, amounted to a *subsequent approbation*; and that the advances subsequently made to the wife, and the entry of the sums subtracted

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(a) 2 Ves. & B. 210; S. C. 1 Rose, 129, 437.

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to the debit of *Mackenzie* in the partnership books, showed that it was intended to consider the amount of these sums as a debt due to the partnership by contract, rather than by fraud. His conduct, however, amounted to nothing more than an attempt to save as much as he could out of the fire. True, he might have dissolved the partnership; but the mere continuance of it cannot be held to purge the prior fraud; for no case has ever gone yet to that extent. With regard to the advances subsequently made to *Mackenzie's* wife,—how can that be said to afford evidence of subsequent approbation, when it is manifest that such advances were made wholly independent of any rights which *Mackenzie* had, and purely from a benevolent wish to save the wife and her family from absolute destitution? And as to the entries of the transaction in the partnership books, these were not made until after the discovery of the fraud, and only in consequence of such discovery. They were made, indeed, not in proof of any approbation, but simply with a view to show the state of the accounts, and as memoranda of the transaction. In *Ex parte Watkins*, in *Sykes' bankruptcy (a)*, there were much stronger circumstances than here to show a subsequent approbation by contract; and yet proof against the separate estate was there admitted, on the ground of fraud. In that case, *Henry Sykes*,—being a trustee for stock in the bank for his co-partners, for the convenience of the partnership,—sold out the stock, in the absence of his co-partner, *Wilkinson*, and applied it to his own purposes. The next day he mentioned the fact to *Wilkinson*, who merely remonstrated by replying he was sorry to hear

(a) 1 Mont. & M. 57.

of it, and that he must replace it as soon as he could. On a subsequent occasion, previous to charging *Sikes* with the dividends, he asked him if the stock was replaced, and finding it was not, he expressed a hope that he would be able to do so speedily. *Sikes* was subsequently charged with the dividends on the stock for a considerable period, viz. from October 1823 (when the stock was sold out) until the issuing of the commission in December 1825; during all which time the partnership continued, without any alteration in consequence of this transaction; and yet the Vice Chancellor held the joint estate entitled to prove, because he thought there was nothing approaching to subsequent approbation. But we contend, that even subsequent approbation in this case could not purge the prior fraud.

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Mr. Swanston, in reply, was stopped by the Court.

ERSKINE, C. J.—This principle of law is conceded by both sides, viz. that as against the separate estate, and in competition with other creditors, there can be no proof by the joint estate, unless the debt is clearly established to be constituted by fraud, as contradistinguished from contract. If the fraud be made out, then a further question arises, namely, whether any subsequent conduct can purge the prior fraud. It is contended by the respondents, that the affidavits establish the fraud of *Mackenzie*, by his withdrawing the bills without the knowledge of his partner; and they insist, that the subsequent conduct of the two partners had not the effect of divesting the transaction of the cha-

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racter of fraud which had previously attached to it. I am, however, far from thinking that the respondents have made out the first point, viz. that the bills were misappropriated by *Mackenzie* in such a manner, as to stamp his conduct with the charge of fraud, in the sense now contended for. At the time *Mackenzie* so applied the bills, it appears that an entry was made by the clerk in the rough day-book,—that from this entry and some loose memorandums, as well as from recollection, the account was subsequently made out and charged by the clerk against *Mackenzie*. It is manifest, therefore, that the clerk knew the whole transaction, and was trusted, as part of his duty, to make a regular entry of it in the partnership books. The rough day-book and these memorandums were, of course, open to the inspection of *Abbott*; and had he looked into the partnership affairs with proper diligence, he might have known of the state of circumstances long prior to his actual knowledge of them. There appears to me, therefore, to have been no intention on the part of *Mackenzie* to disguise the transaction, so as to raise the presumption of a fraudulent intention. In *Smith's case* (a), the entry made by the partner who abstracted the property, and who had the management of the business, was held to preclude the charge of fraud; and so it must be held here. But even if original fraud had been established in this case, I should be inclined to think that it was purged by the subsequent conduct of *Abbott*. For I take the meaning of subsequent approbation to be, any arrangement by which a debt arising by fraud is subsequently brought back to a mere partnership account. That was done here; and

(a) *Supra*.

therefore the debt must be considered as one arising by contract, and for this reason not provable by the joint against the separate estate.

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Sir J. CROSS.—It is admitted on all sides, that to entitle the joint estate to prove against the separate estate, the fact of fraud must be established. Now, to substantiate a charge of fraud, the strictest proof is requisite; and yet all that appears in this case is, that some 20 years ago *Mackenzie* drew out 1500*l.* more than he was entitled to draw from the partnership fund. Upon the second point, viz. of subsequent acquiescence, it is unnecessary that we should express any opinion, being satisfied on the first that there was no fraud.

Sir G. ROSE.—The whole question in this case is, was there fraud, or not, in the original transaction? I can only bring my mind to answer this in the negative. The state of circumstances at the time of the bankruptcy, and the entries in the partnership books, all indicate nothing more than contract. Supposing, upon all the facts of this case, *Mackenzie* had been brought before a magistrate to answer a charge of fraud. The inevitable result would have been, that the magistrate would have discharged him, because the matter alleged against him would have amounted simply to a matter of contract. The case of *Ex parte Watkins* (a) is open to the observation, that as *Sikes* was guilty of a breach of trust, proof might have been made either against his joint or separate estate. Now, although in this case, had the parties remained solvent, *Abbott* might have recovered against his partner, yet by the intervention

(a) *Suprà.*

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of bankruptcy, his rights are subjected to a different principle; and no case of fraud, having the character of felony, being made out, the proof must be expunged. If there is ultimately any surplus out of *Mackenzie's* estate, then indeed it may be made available to satisfy the rights of the joint estate.

ORDERED, that the proof should be expunged;
the assignees to have their costs out of the
general estate, and the other parties out of
their respective estates (a).

(a) This case was subsequently appealed from, see 1 Mont. & Ayr. 357; but the petition was dismissed, on the ground of its being a decision upon a matter of fact, and not on a matter of law, and therefore a case not subject to appeal. See 1 & 2 W. 4. c. 56. s. 3.

Westminster,
January 14,
1835.

Ex parte WILLIAMS and others.—In the matter of
RAIKES.

Where property pledged by the bankrupt with a creditor is claimed by a third person, the creditor may enter a claim on the proceedings for the whole of his debt, till the legal right to the property is determined.

THIS was a petition to enter a claim on the proceedings under the following circumstances:—The bankrupt was indebted to the petitioners in the sum of 23,000*l.*, and had pledged with them a quantity of iron, to secure in part the payment of the debt. An apportionment had been made of the value of the iron in satisfaction of part of the debt, and the petitioners proved for the difference; but the iron had been subsequently claimed by a third person. The present application was, therefore, that the petitioners might be permitted to enter a claim for a sum equal to the value of the iron, in order that they might be afterwards admitted creditors for that sum, in case it should turn

out that the person who had claimed the iron was legally entitled to it.

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Mr. Montagu was in support of the petition.

Ordered as prayed.

Ex parte DEWDNEY and others.—In the matter of
DAVY.

THE petitioners claimed as legal mortgagees of certain freehold and leasehold property belonging to the bankrupt, and had applied to the Commissioner to take an account of what was due for principal and interest, and direct a sale of the mortgaged property; which the Commissioner refused to do, until some further investigation took place as to the circumstances under which the mortgage was given.

Westminster,
January 14.

The Court will not interfere in making an order for the sale of mortgaged property, where the circumstances are suspicious, as to the mortgage being a fraudulent preference.

It appeared, that the bankrupt, at the time of his marriage in 1812, had given a bond to the petitioners for the payment of the sum of 3000*l.*, upon the trusts of his marriage settlement; and that this sum never having been paid, he executed a mortgage to the petitioners in February 1834, to secure the sum mentioned in the bond. The fiat issued against the bankrupt on the 21st June 1834. The objection taken by the assignees to the mortgage before the Commissioner was, that as more than twenty years had elapsed since the date of the bond, without any interest having been paid upon it, previous to the execution of the mortgage, the bond must be presumed to have been satisfied; and that the mortgage was therefore executed by the bankrupt without consideration.

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Ex parte
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The present petition was an appeal from the decision of the Commissioner.

Mr. *Keene*, in support of the petition, contended, that although twenty years had elapsed since the bond was given, the remedy only was gone, but that the debt was not extinguished.

Mr. *Bethell*, for the assignees, said, that the petitioners were bound to assign some reason for the delay, before the bond could be admitted as a good consideration for the mortgage.

ERSKINE, C. J.—The circumstances are so suspicious, that I think the Commissioner was quite right in requiring further information, before he made the usual order for sale.

Sir J. Cross.—There is good ground for presuming the mortgage to have been a voluntary preference given by the bankrupt to the petitioners, so far as to call on the petitioners to show it was not; and this they have not done.

Sir G. Rose.—If the mortgage is good, what the Commissioner says will not affect it.

Petition dismissed with costs.

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1835.

Ex parte JOHN LUTHER RICHARDS and WILLIAM RICHARDS.—In the matter of JOHN TREVOR and JOHN RICHARDS.

THIS was the petition of the two sons and representatives of one of the bankrupts, praying that the account of the assignees, which had been delivered to them, might be referred for examination, and that the bills of the solicitor might be taxed.

A joint commission issued against the bankrupts on the 1st November 1816, since which both the bankrupts, as well as the original assignees, had died. The Commissioners were also dead; in consequence of which a renewed fiat was issued on the 2d May 1833, directed to other Commissioners, under which fresh assignees were appointed.

The bankrupt, *John Richards*, by his will, bequeathed all his personal estate equally between the petitioners; and also devised all his real estates between them, as tenants in common, and appointed them executors of his will.

On the 12th June 1834 the petitioners presented a petition to the Court of Review, praying that the amount of the liability of the estate of *John Richards* might be declared, the petitioners thereby offering to discharge the amount of such liability, on having the devised estates therein mentioned conveyed to them by the assignees. By an order made on the hearing of this petition it was declared, that the estate of *John Richards* was liable to—and that the assignees were entitled to receive therefrom, as such assignees—

Westminster,
January 15.

After there has been a change of assignees, and a long period of time has elapsed, the Court will not refer the accounts of the assignees for examination, for the purpose of charging the new assignees with the default of the former assignees.

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the principal sums of 2063*l.* 15*s.* 11*d.*, 1862*l.* 10*s.* 1*d.*, and 406*l.* 15*s.* 9*d.*; and that the assignees were also entitled to be paid interest on the said several sums of 2063*l.* 15*s.* 11*d.*, and 1862*l.* 10*s.* 1*d.*, after the rate of five per cent. per annum, from the 28th February 1815 down to and until the time of payment of the same respectively; and that upon payment of such sums, the assignees should convey the estates of the bankrupt, *John Richards*, to the petitioners accordingly.

In pursuance of this order, the several sums above mentioned were duly paid by the petitioners to the assignees; and the estates were accordingly conveyed by the assignees to the petitioners.

The petitioners then stated that, in consequence of an application made by them for that purpose, they had been lately furnished with an account of the assignees with the separate estate of *John Richards*; which the petitioners alleged was not only exorbitant in the charges, but incorrect in principle, in the following instances; that is to say—the sum of 70*l.* 17*s.* 2*d.* was charged as the share of the petitioning creditor's bill, as also 11*l.* 6*s.* 10*d.* as the share of the messenger's bill, which the petitioners contended ought to have been paid out of the funds of the joint estate; and the sum of 25*l.* was likewise charged to the debit of the separate estate, as an allowance for the trouble of the assignees on this estate. The account also contained charges of various sums of money paid to Messrs. *Brookes* and *Lee*, on account of their bills of costs, as solicitors to the commission, amounting in the whole to 645*l.* 15*s.* 4*d.*; which bills of costs, the petitioners

alleged, contained in many instances exorbitant charges, and had never been taxed.

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Mr. *Swanston*, and Mr. *Dixon*, appeared in support of the petition. The question is, whether the petitioners, who have paid 20s. in the pound, with seventeen years interest, have not a right to come to this Court and insist on having a proper account rendered of the receipts and payments of the assignees. The account already delivered shows, on the face of it, that it ought to be examined; to take, for instance, one item of 25*l.*, which is charged for the labour and personal trouble of the assignees. All trustees are bound to account for their receipts and payments; and these assignees do not pretend that they have so accounted. [*Erskine*, C. J. The only money, it appears, which the present assignees have received, is the money paid to them by the petitioners for the conveyance of the bankrupt's real estates. Was not the proper time for taking the account, at the audit previous to the dividend?] It is of the audit we complain; for the Commissioners allowed bills of costs which had never been taxed. When the present assignees were chosen under the renewed fiat, they, by acceptance of the office, assumed all the liabilities of the former assignees. Before the death of the bankrupt, *John Richards*, which occurred in April 1833, the petitioners had no *locus standi*, and could not demand an account; but they called for one in October 1834, which was furnished by the present assignees, without any pretence set up by them that they were not liable to account. [*Erskine*, C. J. It would have been wrong in these assignees, not to have furnished you with an account, to enable you to take the proper steps against

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the parties really liable.] We contend that the costs, as between the joint estate and the separate estate of *Richards*, have been improperly apportioned, and that various sums have been improperly charged against the separate estate. All that the petitioners ask is, that this account may be referred for examination; they do not pray that the assignees may be charged with any liability. [Sir *J. Cross*. Is it not incumbent on you to show some purpose of justice, which is to be attained by examining the account?] We only want to see, whether we have not overpaid a large sum of money; and shall know where to find a remedy against any parties who may be liable to refund.

Mr. *Barber*, and Mr. *J. Russell*, who appeared for the assignees, here stated, that the bankrupt *Richards* had not obtained his certificate, and that therefore this petition would not lie by his representatives.

Mr. *Swanston*, and Mr. *Dixon*. It is a mistake to suppose that the bankrupt has not got his certificate. He has got it, although the fact is not alleged in the petition. We say, however, that the allegation is immaterial. But if it be material, the omission may be easily remedied, by amending the petition. The present case is that of the owner of the residue of a bankrupt's estate, coming at the first moment to question an account after its delivery.

Mr. *Barber*, and Mr. *J. Russell*, for the respondents, were stopped by the Court.

ERSKINE, C. J.—It has been said by the counsel for

the petitioners, that the object of this petition is not for an account, but merely to refer the account already delivered for examination. But where is the meaning of referring this account for examination, unless some party, who is implicated in the account, and who is now before the Court, is to be rendered liable upon it? Assume the facts, however, as stated in the petition to be correct, namely, that enormous charges have been made by the former assignees, and that they have paid the solicitor's bill, without having it previously taxed—what would be the effect of these facts being substantiated by the petitioners? Why, a right to call on any person having improperly received monies belonging to the estate, and to compel him to refund them; and the result of the taxation of the solicitor's bills would be, also, to compel the assignees to refund to the petitioners what had been thus improperly paid. And if the present assignees had been the assignees who had actually paid this money, then the Court might possibly have acquiesced in the prayer of the petitioners. But the former assignees are dead; and all these supposed delinquencies took place in their lives-time, and before the choice of the present assignees. It is said, however, that the present assignees, who were chosen in 1833, are compellable to account for all monies received by them. But what have the present assignees received? It is not pretended that they have received any monies, except those paid to them by the petitioners, for the conveyance of the interest of the assignees in the bankrupt's real estate. The sale of that estate would have been an injury to the representatives of the bankrupt; and therefore they came to this Court, to have the amount declared for

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which the estate was liable, and to obtain an order for the estate to be conveyed to them, on payment of that sum; and the Court made the former order accordingly. The question was then fully settled, what one party was to pay, and the other to receive; and the only money, which has come to the hands of these assignees, is what was then paid by the petitioners, in accordance with the prayer of their own petition. If the petitioners were dissatisfied with the accounts which have been rendered them, they should have called before the Court the proper parties who were chargeable with any deficiency. They have no just claim against the present assignees, for any thing *they* have done in the exercise of their trust, but only against the former assignees; who have never, on any occasion, been brought before the Court.

Sir J. CROSS.—This petition must be looked upon, as if it was that of the bankrupt himself. The petitioners on the former occasion came to this Court, to know what they were to pay to the assignees, for the purchase of their interests in the bankrupt's real estates; and the Court declared, that the assignees were entitled to receive three several sums, amounting in the whole to 4333*l*. The money is paid—the purchase is made—the estate conveyed. Now if there was ever an estoppel arising from the conduct of a party, there is surely one here. It is said, however, that there is no estoppel in a Court of Equity, where the slightest injustice might be occasioned by it. But I do not see that any purpose of justice would be answered, by opening this account. The object of the present application is nothing more nor less than this:—The petitioners say, we have paid

the assignees 4333*l.* for the purchase of the estate; but we wish to have some of it paid back again; we will keep the estate; but we will try to get some portion of the purchase-money refunded. This would be gross injustice to the present assignees, as well as to the rest of the bankrupt's creditors. Had the petitioners, on the former occasions when they applied for a conveyance of this property, made their stand and said—We ought not to pay so much as 4333*l.* for the purchase of this estate—there might possibly have been some reason for objecting to the amount then ordered to be paid. But in the present stage of the proceedings, I think they have no right, either at law, or in equity, to open an account after it has thus been finally closed.

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Sir G. ROSE.—There are no cases in which this Court is more ready to assist a party, than on the petition of a bankrupt to have his estate properly accounted for. In 1834, it appears that an account was called for by these petitioners of the receipts and payments by the assignees, in respect of the separate estate of *John Richards*. That account was duly rendered to the petitioners; and the whole account must have previously been taken of the receipts and payments in respect of the joint estate; for it is not an unreasonable argument on behalf of the assignees, that it was only by taking the account of the joint estate, that they could properly arrive at the amount of the liability of the separate estate. It is said, however, that the account already rendered only gets rid of the liability of the assignees, in respect of the separate estate, but that their liability in respect of the joint estate still continues. But it is impossible to look at

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the deliberate order of the Court made on the former application, without a perfect understanding that there was, previous to such order being made, a proper statement of accounts between the two estates. If we were to order this account to be referred for examination, in order to render these assignees liable for the receipts and payments of the former assignees, we should embarrass them with difficulties almost insurmountable. If indeed it had been proved, that there was any joint estate still existing, then there might be no difficulty in holding, that that, *pro tanto*, should be liable to the separate estate, for any deficiency in the accounts of the former assignees. But as that is not the fact, I think there is no ground for this petition.

Petition dismissed with costs.

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Ex parte JOHN LUTHER RICHARDS, and WILLIAM RICHARDS.—In the matter of JOHN TREVOR and JOHN RICHARDS.

Westminster,
January 15.

Where a party purchases of a creditor all his right to the dividends and interest on his proof, *semble*, that such party cannot proceed against the assignees by petition for an order to pay to him the dividends on the proof, but must be left to the ordinary means of enforcing the contract by action at law, or suit in equity.

THIS was another petition of the same petitioners in the same bankruptcy as the last case, praying that the assignees might be ordered to pay to them the dividends on a proof made by a creditor, to whom, as the petitioners alleged, they had paid 20s. in the pound in full discharge of her debt. The circumstances were as follows:

On the 1st July 1833 the petitioners entered into a written agreement with the creditors of the bankrupts, whereby the creditors agreed, that in consideration of the petitioners doing whatever acts might be

necessary for effecting a sale or mortgage of the real estates of the bankrupt *John Richards*, they would accept a dividend of 20s. in the pound on their respective debts, without any claim for interest. One of the creditors, *Edmund Stokes*, who had proved a debt of 760*l.* 15*s.* 6*d.*, died before this agreement was entered into; and on the 15th July 1835 the petitioner *J. L. Richards* called on *John Stokes* his son, who resided at Thropwood in Cheshire, to obtain the signature of *Ann Stokes*, his widow and administratrix, to the agreement; but found that she was then residing at Liverpool. *John Stokes*, however, signed the agreement, as the agent and on the behalf of his mother. The petitioners alleged, that they had paid to those creditors who had signed the agreement such sums as amounted, together with former dividends, to the full amount of 20s. in the pound on their respective debts; and that on the 16th November 1833 the petitioner *John Luther Richards* proceeded to Liverpool, and called upon *Ann Stokes* at her residence there, and paid to her the sum of 253*l.* 6*s.* 3*d.*, being the balance then due to her of 20s. in the pound upon the debt proved by her deceased husband, *Edmund Stokes*; when she signed the following receipt:—

“Received, the 6th November 1833, from Messrs. *J. & W. Richards*, the sum of 253*l.* 6*s.* 3*d.*, in discharge of all principal and interest due from the estate of *Trevor and Richards*, bankrupts, in respect of a debt of 760*l.* 6*s.* 8*d.* proved against the estate, notwithstanding there may be sufficient effects to pay me all principal and interest in full.

ANN STOKES,

253*l.* 6*s.* 3*d.*

Administratrix.”

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The assignees had paid to the petitioners all subsequent dividends, which had been declared upon the debts of the several creditors who had signed the agreement, except those on the debt of 760*l.* 15*s.* 6*d.* proved by *E. S. Stokes*; and these they refused to pay, on the ground, that *Ann Stokes*, the administratrix, had claimed interest on the debt from the assignees.

The petitioners prayed, that the assignees might be ordered to pay over to them all the remaining dividends on this debt; and that the assignees, or *Ann Stokes*, might also pay the costs of this application.

Mrs. Stokes had made an affidavit, denying all authority of her son to sign the agreement, and stating, that she signed the receipt without reading it.

Mr. Swanston, and *Mr. Dixon*, were in support of the petition. The petitioners are entitled to receive these dividends, by virtue of the receipt signed by *Ann Stokes*, and the agreement signed on her behalf by her agent, *John Stokes*. [*Sir J. Cross*. Is not this a mere purchase of dividends of one creditor by another, and have we any jurisdiction in the matter?] [*Sir G. Rose*. Did you ever know any question as to dividends occurring in a Court of Bankruptcy, except on a petition, or a cross-petition, between the assignees and the creditor who had proved the debt on which the dividends were payable? This is nothing more than a contract between the creditor and a third party, who must be left to the ordinary means of enforcing that contract. Before the late act^(a), it was the common course for the creditor to bring an action at law

(a) 6 *Geo.* 4. c. 16.

against the assignees, for the recovery of the dividend on his proof; but Lord *Eldon* settled the practice of proceeding by petition, as the most convenient as well as the most effectual mode, and suggested the provision(a) in the new statute, which takes away the right of action from the creditor, and confines him to the proceeding by petition. But this proceeding must be looked upon as in the nature of an action, and the fund as money had and received in the hands of the assignees, for the use of the creditor who has proved the debt.] The Court will entertain jurisdiction over any creditor who has proved a debt, for all purposes, and will not limit their jurisdiction merely to any question of proof. Moreover, this Court, having jurisdiction over the fund out of which the dividends are payable, has a right to do justice in the administration of that fund, which is quite as much under the control of the Court after a dividend, as before. The order of dividend in this case was only made on the 26th August last. [Sir *G. Rose*. The proper course for you to pursue was, to apply to expunge Mr. *Stokes's* proof.] That mode of proceeding would be circuitous and expensive. [*Erskine*, C. J. That course of proceeding would however give us the power, if we thought fit, of staying the payment of the dividends in the hands of the assignees.]

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and another.

The COURT then asked the counsel for the respondents, whether he would consent to meet the question, as on a petition to expunge the proof.

Mr. *J. Russell* having acceded to this proposal,

(a) 6 Geo. 4. c. 16. s. 111.

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and another.

dence, then, must be offered of the authority of the son to act as her agent. It is not necessary, perhaps, to prove a direct authority in this particular instance; but it may be presumed from subsequent recognition, or some act afterwards done by her. It has been contended, that as one of the petitioners, *J. L. Richards*, afterwards procured from *Mrs. Stokes* an acknowledgment that she received the sum of 253*l.*, in discharge of all principal and interest due from the estate of the bankrupts, she, by doing so, admitted the validity of the previous agreement. If she had indeed written the receipt herself, then that fact might have been strong evidence that she knew of the prior agreement, and recognized its validity. But the receipt was ready written by *Richards*, before he applied to her to sign it. Now, without imputing any fraud to the conduct of *Richards*, it nevertheless plainly shows, that nothing which passed on this occasion could in any way connect the receipt with the previous agreement. In the absence therefore of all proof of any authority given to her son, or any subsequent recognition of his act, I cannot conclude, from the mere circumstance of finding her name to this receipt, that she had any knowledge of the previous agreement which he had taken upon himself to sign on her behalf. But, besides this, all knowledge of the agreement is expressly denied by *Mrs. Stokes*. We must therefore look upon the case, as if there had been no such agreement. Then, upon the face of the receipt itself, it is plain that a smaller sum was paid to *Mrs. Stokes* by *J. L. Richards*, than what she was really entitled to; and it has always been held, that the receipt of a smaller sum in satisfaction of a

larger one due to a creditor, is not an answer to an action for the debt (a).

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and another.

Sir J. Cross.—I am always anxious not to give my opinion on the merits of a case, until all the facts are fully developed. It has turned out in the progress of this inquiry, that an ample sum was in the hands of the assignees, which was sufficient to pay interest to Mrs. Stokes and the other creditors on their respective debts. Upon this, the petitioner, *J. L. Richards*, goes to Mrs. Stokes, and asks her to give him a receipt, the effect of which is to make him a present of a large sum for interest on her husband's debt, to which she was fully entitled. The son swears, that he had no authority to sign the agreement. I should be slow to believe, that he ventured to sign the agreement, without any authority from his mother. But of this I am perfectly sure, that when he did sign it, he could not be aware that the assignees had then a sufficient fund in their hands to pay the interest due on this debt. Mrs. Stokes, in her affidavit, gives an account of what passed at the time of signing the receipt; and this affidavit, which was sworn on the 8th December, has not been contradicted by the petitioners. It was essential, too, for a right determination of this case, that the agreement and the receipt should have been produced. But although these documents are both in the possession of the petitioners, they have not thought proper to produce them before us this day. I can therefore only arrive at one conclusion, after an attentive consideration of the circumstances of this case,—and that is, that one of the petitioners, by an improper conceal-

(a) See note, *ante*, p. 195.

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ment of the facts. obtains possession of this receipt, in the hope of receiving a sum of money which was clearly due to Mrs. *Stokes*. In this hope I trust he will be disappointed, by our rejecting the present petition.

Sir G. ROSE concurred.

Petition dismissed with costs.

Ex parte JOHN RAMSBOTTOM and others.—In the matter of EDWARD PENFOLD, JOHN SPRINGET, and WILLIAM MARGESSON PENFOLD.

Westminster,
January 16.

Where there has been an order made for the sale of mortgaged property, and the sale is afterwards deferred, the mortgagee is entitled to apply the rents and profits in reduction of the interest accruing subsequent to the order of sale, and up to the time of taking the account.

THIS was a petition of assignees, under the following circumstances:—

The two bankrupts, *Edward Penfold* and *John Springet*, were previous to July 1810 in partnership as bankers with *Robert Parker*, who advanced to the partnership 30,000*l.* three per cent. annuities; in consideration of which, *E. Penfold* gave *Parker* a bond to transfer to him 9000*l.* like annuities, and *J. Springet* also gave him his bond for the transfer of another sum of 9000*l.* like annuities; the condition of which bonds being broken, *Parker* in 1814 brought actions on the bonds, and obtained judgment in each action against the respective obligors; soon after which *Parker* retired from the partnership.

On the 14th July 1814, the three partners executed a deed declaring the terms of the dissolution of their partnership. This deed recited, that the two sums of 9000*l.* three per cent. annuities were still due from *Penfold* and *Springet*, and that the further sum of

2000*l.* like annuities was also owing to him from the partnership. It was then witnessed, that *Parker*, for the considerations therein mentioned, assigned his share in the concern to *E. Penfold*; and *E. Penfold* and *Springet* covenanted to transfer to *Parker* the several sums of 9000*l.*, 9000*l.*, and 2000*l.* three per cent. annuities, by four equal instalments, in the years 1815 and 1816; and that certain securities mentioned in the schedule should be retained by *Parker* for the space of two years, as an indemnity against the partnership contracts, and that such securities should also be retained by him until the whole of the sums of 9000*l.*, 9000*l.*, and 2000*l.*, three per cent. annuities, were discharged.

After the retirement of *Parker*, *William Margesson Penfold* was admitted a partner.

On the 6th September 1815 *Parker* and *E. Penfold* entered into a written agreement, by which it was agreed that the three last instalments of the 20,000*l.* three per cent. annuities should be accounted for in money, at the price at which they were originally sold out, and that interest at 5*l.* per cent. should be paid to *Parker*, until these sums were discharged; that the balance of the debt should be taken to be in money 10,083*l.* 15*s.*; and that, for the accommodation of the continuing partners, the payment of one-half should be postponed until the 5th July 1818, and the payment of the other half until the 5th July 1820.

On the 27th March 1816, a commission of bankrupt issued against *E. Penfold*, *Springet*, and *W. M. Penfold*; and the claim of *Parker* against the bankrupts had been subsequently much litigated.

In 1821 he presented a petition to the Lord Chancellor, for the sale of the securities remaining in his

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hands, with liberty to prove against the joint or separate estates, for the balance unsatisfied by the proceeds of the sale. Upon this petition, which was heard before the Vice-Chancellor in February 1822, an issue was directed to ascertain what was owing to *Parker* by the bankrupts. From this order *Parker* appealed to the Lord Chancellor, who directed the following issues,— 1st. Whether *Parker* was entitled to prove any and what debt under the commission; and, 2dly. Whether he had any legal lien upon the securities mentioned in the schedule to the deed of the 14th July 1814. These issues were tried in May 1823, when a verdict was found for *Parker*, subject to the opinion of the Court of King's Bench on a special case, which was argued in Trinity term 1824; (a) when the Court decided, that the agreement of the 6th September 1815 was void for usury, but that the deed of dissolution remained binding; and that *Parker* might prove for the value of 15,000*l.* stock, taking the price of stocks on the respective days when the two first sums of 5000*l.* ought to have been replaced, and taking the remaining 5000*l.* according to its price on the day of the bankruptcy; and that *Parker* had a lien on the securities as given to him by the deed.

In March 1825, *Parker* presented a petition to the Lord Chancellor, praying that the decision of the Court of King's Bench might be confirmed; and the assignees also presented a cross-petition. These petitions came on to be heard before Lord *Eldon* on the 16th March 1826, when his Lordship made an order to the following effect:—

That the decision of the Court of King's Bench

(a) See *Parker v. Ramsbottom*, 3 B. & C. 257.

should be confirmed, so far as the same declared the agreement of the 6th September 1815 usurious and void, but the prior securities valid. That *Parker*, by virtue of the judgments obtained by him against *E. Penfold* and *J. Springet*, was entitled to prove against the separate estate either of *E. Penfold*, or *J. Springet*, according to his election, for the value of the sum of 15,000*l.* three per cent. annuities, at the average price of such annuities at the date of the commission, which was admitted to be 9150*l.*; together with the dividends which had then accrued due thereon, deducting therefrom what should have been already received. That he was, in like manner, entitled to prove against the separate estate of *E. Penfold*, or *Springet*, for the amount of the notes and debts of the firm of *Parker Penfold* and *Springet*, paid by him since the issuing of the commission. That from the proof, in respect of the 9150*l.*, there should be deducted the amount of what *Parker* had received, or should receive; on account of the several securities mentioned in the schedule to the deed of dissolution, the amount of such deduction to be settled by the Commissioners. That *Parker* should be allowed to deduct, receive, and retain the rents, issues, and annual profits, which from and since the date of the commission up to the date of the order, should have arisen or accrued due upon, from, or in respect of the said several securities, in or towards payment of the dividends of the 15,000*l.* stock prior to the bankruptcy, and the interest subsequent to the date of the said commission, on so much of the sum of 9150*l.*, as should from time to time have remained due. But in case the amount of the rents, interest, and annual proceeds, accrued

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subsequent to the date of the commission, should be more than sufficient for the payment of the interest, after the rate of five per cent., accruing on so much of the said sum as should be remaining due from time to time, then it should be applied in reduction of the principal. That the premises comprised in the several securities remaining in the hands of *Parker* should be sold, with liberty for him to bid at the sale;—with the usual order as to costs, and the application of the proceeds, and liberty to prove for the balance of the debt.

The property comprised in the several securities held by *Parker* was sold in 1827; and in proceeding to take the accounts directed by the order, *Parker* contended that he was entitled to compute interest on the residue of the 9150*l.* to the time when the account should be finally taken and settled, and to apply the rents and profits of the property, until the time of the completion of the sale, and the interest of the proceeds arising subsequent to the sale, in satisfaction of the interest on his debt; whereas the assignees contended that, according to the construction of the Lord Chancellor's order, *Parker* was only entitled to interest up to the date of the order. The Commissioner, before whom this question was mooted on taking the account, was of opinion that interest was not intended to cease at the date of the order, but that *Parker* was entitled to subsequent interest.

The assignees now prayed for a declaration of this Court, that interest ceased at the date of the order.

Mr. *Swanston*, and Mr. *Bethell*, appeared in support of the petition. The estate of a bankrupt can be charged with no debt accruing since the date of the

commission ; for the only debt, which can be proved, is the amount owing when the commission issues. [*Ers-
kine*, C. J. Lord *Eldon's* order expressly directs that the mortgagee in this case might receive interest up to the date of the order, although subsequent to the commission.] Without impugning that order, we have a right to look at this case independently of the order. For the purpose of proof, it cannot be denied that (with some statutable exceptions, as in the case of contingent debts) the only debt, that is recognized, is the amount due to the creditor at the date of the commission; and the same principle applies, whether a creditor has a security, or no security, for his debt. If the creditor, who has a mortgage for his debt, does not seek to prove under the commission, his right then to interest accruing since the date of the commission cannot be disputed. But if he seeks to prove, he has no greater right than any other creditor who comes in under the commission. The creditor in this instance cannot, because he has a security which is fruitful, make use of the security, not in discharge of a debt which he could prove, but in discharge of a subsequent accruing debt which is not provable. It is admitted, that the practical question in this case depends upon the construction of Lord *Eldon's* order. Now his lordship there directs, that in case the amount of the rents, interest, and annual proceeds, accrued subsequent to the date of the commission, should be more than sufficient for the payment of the interest at the rate of five per cent. accruing on so much of the sum of 9150*l.* as should be remaining due, then that the surplus should be applied in reduction of the principal. But the order does not state, that *Parker* is to be entitled to

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interest subsequent to the date of the order. [*Erskine*, C. J. Your case is, as I understand it, that the right of *Parker* to the rents and profits is to be confined to those accruing from the date of the commission up to the date of the order. Who, do you say, is entitled to the rents and profits from the time the order was made?] Not the mortgagee, certainly. We say, that the rents and profits subsequent to the order become part of the bankrupt's estate. [*Erskine*, C. J. Has not a mortgagee the right to apply the rents and profits of the mortgaged estate, in satisfaction of the interest due on his mortgage subsequent to the commission?] In this case the order directs, that the mortgagee shall be allowed to retain only the rents and profits from the date of the commission up to the date of the order, and that the mortgaged property shall be sold. But the mortgagee says, "I will delay the sale, and keep possession of the property, by which means I shall get more than what is allowed me by the order." [*Erskine*, C. J. The petition charges no delay of the sale—the sale and the order were both in 1827.] When there is an order for sale of the security, it then becomes part of the bankrupt's estate. [*Erskine*, C. J. I do not understand, that the mortgagee gives up the security when the order is made; he merely claims to have it sold.] [Sir *J. Cross*. Supposing that the purchase-money had been paid to the mortgagee at the date of the order, would he not have had the benefit of the subsequent interest of the purchase-money? Then why should he not be equally entitled to the rents and profits, while the property remains unsold?] In the case of *Ex parte Badger* (a), Lord Loughborough,

(a) 4 Ves. 165.

putting a construction upon his own General Order of 8th March 1794, held, that where a mortgage upon a bankrupt's estate proved deficient, and the mortgagee proved the remainder of his debt under the commission, he could not charge interest beyond the date of the commission.

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Mr. Twiss, and Mr. J. Russell, for the respondents, were stopped by the Court.

ERSKINE, C.J.—It is not necessary in this case to discuss the question, whether an equitable mortgagee is, under Lord *Loughborough's* General Order, entitled to interest after the date of the commission, up to the date of the order of sale; because the Order made by Lord *Eldon*, for the sale of this property, expressly declares that right. It is contended here, however, that the mortgagee is bound to bring into account such monies as he has received subsequent to the date of the order. It is perfectly true, that a mortgagee cannot prove for interest subsequent to the date of the commission. But the assignees say, that what the mortgagee claims here amounts to the same thing. To determine the right of the mortgagee in this respect, we must refer to the terms of Lord *Eldon's* Order. That order declares, that he was entitled to go in and prove for the amount of his debt. After establishing thus the validity of his debt, it declares, that he shall be allowed to retain the rents and profits accruing subsequent to the commission, and up to the date of the order, towards payment of the interest subsequent to the date of the commission, and then in reduction of the principal; and that the estate

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shall be sold, with liberty for him to prove for the balance of his debt remaining unsatisfied by the proceeds of the sale. But when this order was made, the account was not then taken of what was due to the mortgagee for principal and interest on his mortgage. I have always understood, that a mortgagee is entitled to the rents and profits of the mortgaged property up to the time of taking the account, notwithstanding this may be subsequent to the date of the order of sale, as well as of the date of the commission. As to his right to receive the rents and profits previous to the date of the order, there is no question in this case; as the order itself expressly decides that point. And it appears to me most unjust, that he should not have them afterwards, as long as the estate remains unsold.

Sir J. CROSS.—The petitioners have given us very scanty information of what are the real facts in this case, subsequent to the order for the sale of the property. As soon as a sale is effected, the purchase-money must, of course, be paid to the mortgagee. Then, which of these parties has the most reason for saying, that he is injured by the delay in selling the property? Why, the mortgagee, no doubt. If the purchaser therefore pays him the interest of the purchase-money, until the contract of sale is completed, he is entitled to retain such interest as a compensation for being kept out of the principal. I am clearly of opinion, that the petition must be dismissed.

Sir G. ROSE.—The assignees by this petition pray for a declaration from the Court, that interest on the debt due to *Parker* ceased at the date of the order.

Now the way in which I have always understood the rule, as to granting interest in these cases, is this:— that for the purpose of *proof*, interest stops at the date of the commission; but in the case where a creditor holds a security for his debt, there the allowance of interest is regulated, so as to give the creditor the benefit of his contract. It was necessary, therefore, in making the former order, to deal with the question of interest, according to the terms of the contract with the mortgagee. The order for sale did not provide for the retention by *Parker* of the rents and profits subsequent to the date of the order; because the sale of mortgaged property generally takes place soon after the making of the order. But if we look at the terms of this contract, would it not be monstrous, that the interest accumulating on this mortgage should not be kept down by the apportionment of the rents and profits of the mortgaged property? The amount of the sum admitted to proof, is the amount of the debt at the date of the commission. But the order for the sale of property under a mortgage does not go specifically into the question of proof at all, except the general direction at the end of the order, that the mortgagee shall be at liberty to prove for the balance of his debt remaining after the application of the proceeds of the sale. I am astonished to hear it said, that the question, as to the right of a mortgagee to interest subsequent to the date of the commission, has not been yet decided in bankruptcy. The mortgagee contracts with the mortgagor for an indemnity out of the mortgaged estate, in case of the non-payment of the principal and interest. Is it not perfectly just, then, that he should be permitted to work out his security in the most effec-

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tual way for his own indemnity? That principle is fully recognized by the case of *Ex parte Martin*, in the matter of *Fowler*(a), where it was held, that a depositor has a right to avail himself of his pledge to its utmost extent, even in point of proof, and to his fullest and most complete indemnity at the time of proving. In that case, a bill of exchange had been deposited as a security with the creditor; who first proved his debt against the estate of the drawer, his principal debtor, and thereby and by other means reduced his debt to 14*l*.; subsequent to that the acceptor became bankrupt; and the creditor was held to be entitled to prove under his commission, not only the 14*l*., but all the interest accruing upon his debt at the time of making that proof, to the complete liquidation of the account, in respect of which he held the bill as a security. Now, in that case, the creditor was admitted to prove not only the balance of his debt due at the bankruptcy of his principal debtor, but a large arrear of interest subsequently accruing on his whole debt. It is quite wrong therefore to say, that the principle, of allowing a mortgagee to claim interest subsequent to the commission, has not been clearly established.

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Petition dismissed with costs.

(a) 2 Rose, 87.



Ex parte JOHN BROOKS.—In the matter of **WILLIAM BALDOCK MOORE.**

1835.

*Westminster,
January 16.*

THIS was the petition of a creditor, to be allowed the costs of various former proceedings, under the following circumstances :

On the 22d November 1831 he was admitted to prove a debt under the commission to the amount of 490*l.* 9*s.*; which the Commissioners, a few weeks afterwards, on the application of the assignees, ordered to be reduced to the sum of 65*l.* 11*s.* 5*d.* From this decision the petitioner appealed to the Court of Review; and obtained an order that the proof should be restored, but that the dividends on the debt should not be paid, until the result of an action at law, about to be brought against the petitioner by the assignees; and that the costs of the petition should be reserved for the further order of the Court. An action was afterwards brought against the petitioner, which was referred; and the arbitrator by his award determined, that judgment should be entered for the petitioner, and that the petitioner should have his costs.

Where the Commissioners expunged a proof, on the application of the assignees, and the creditor afterwards succeeded on a petition to have it restored, the Court gave him the costs of the petition, as well as of the proceedings before the Commissioners; making it an exception to the general rule, that costs are not given against the decision of the Commissioners.

The prayer was, that the future dividends on the debt might be paid to the petitioner; and that his costs of the proceedings before the Commissioners, and incidental to expunging his proof, as well as his costs of this petition, might be also paid to the petitioner out of the bankrupt's estate.

Mr. Elderton, in support of the petition, cited the case of *Ex parte Reay*(a), where the Commissioner having improperly made a reduction in a creditor's

(a) 3 Deac. & Ch. 175.

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—
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proof, the Court ordered the costs of a petition to restore it on the proceedings, to be paid by the assignees out of the estate.

Mr. *L. Wigram, contra*. The general rule is, that costs are never given against a decision of the Commissioners, where they exercise a deliberate judgment; *Ex parte Millington (a)*. The merits of the case on the question of costs are rather against the petitioner; for the arbitrator, though he ordered the costs of the action to be paid by the assignees, directed the petitioner to pay the costs of the award. At all events, the petitioner is not entitled to the costs of the proceedings before the Commissioners for the reduction of the proof.

Mr. *Elderton*, in reply, was stopped by the Court.

ERSKINE, C. J.—The giving or refusing costs to a petitioner, is always a matter in the discretion of the Court; notwithstanding the Court lays down general rules on the subject, with certain exceptions. In this case the proof of the creditor was admitted, in the first instance, by the Commissioners; but the assignees afterwards contest the amount of it, and the Commissioners then make a reduction in the amount. It is however subsequently restored, by order of this Court. The present case, therefore, is not like an ordinary case of appeal from the judgment of the Commissioners; for their judgment was originally in favour of the petitioner, in the admission of the proof; and the assignees, by vexatiously disputing the amount of his debt, have compelled him to come here to get it re-

(a) 1 Mont. & A. 114; 3 Dea. & Chit. 307.

stored. I think it but just, therefore, that the petitioner's costs should come out of the estate.

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Sir J. Cross.—In Courts of Common Law it is not usual, I believe, to cite cases on a discussion of costs; for the question, by whom the costs of any proceeding are to be paid, must always depend upon the circumstances of each particular case. From the result of all the hostile proceedings in this case, which have been instituted by the assignees, it plainly appears, that the petitioner, as well as the Commissioners, were right, *ab initio*; and that all the petitioner's subsequent costs have been occasioned by the groundless opposition of the assignees to the amount of his proof. I coincide, therefore, in opinion with his Honor the Chief Judge, that it is but common justice to the petitioner, that he should in this instance be allowed his costs.

Sir G. Rose concurred..

Ordered as prayed—the costs of the assignees also to come out of the estate(a)

(a) And see 3 Dea. & Chit. 309, note (a).

Ex parte BOOTH.—In the matter of KEW.

THIS was the petition of a creditor, on behalf of himself and the other creditors of the Norwich Banking Company, praying that an action of trover, which the assignees had brought against the Company, might be stayed. It appeared, that the bankrupt, previous to his

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January 16.

An injunction will be granted to restrain assignees from proceeding in an action, where they have not an equitable, as well as a legal, right.

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bankruptcy, had kept a banking account with the Company, and had deposited with them a policy of assurance of the Norwich Life Insurance Office, as a security for any eventual balance that might be due. At the time of his bankruptcy, the bankrupt was indebted to the petitioners in the sum of 400*l.*; when they received from the Insurance Office 35*l.*, as the value of the policy, which they thereupon gave up to the office. The assignees contended, that the petitioners were bound to give up the policy to them, and accordingly brought an action of trover against them to recover the value of it; which action it was the object of the present petition to stay. The petitioner undertook to abide by any order which the Court might make.

Mr. *Montagu* was in support of the petition.

Mr. *Rogers*, for the assignees. There is not sufficient proof, that the Insurance Office had notice of the deposit of the policy with the petitioners; for all that is stated in the petition on this subject is, a vague allegation that the office "had notice of the deposit;" without stating *when* notice was given, or even that they had *due* notice of the deposit. For any thing that appears on this petition, the office might not have had notice from the petitioners, until after the bankruptcy. The policy was, therefore, in the order and disposition of the bankrupt at the time of his bankruptcy; and the assignees have a right to recover the value of it in an action of trover. Besides, the petitioners in this case do not go regularly before the Commissioners, and apply to them to put a proper value on the policy; but they privately put their own value on it, without any

communication with the Commissioners, or the assignees. [*Erskine*, C. J. If you can show, that the policy was worth more than the value which the petitioners put upon it, the assignees might then have some claim against them. But the setting a value on the policy was not a private transaction of the petitioners; for they only prove for the balance of their debt, after deducting the value which they had put upon the policy.] [*Sir G. Rose*. The petitioners would have rendered themselves liable to the assignees, if they had proved the whole of their debt, without deducting the value of the policy.]

1835.

Ex parte
Booth.

ERSKINE, C. J.—The question is, whether, under these circumstances, the assignees ought not to be restrained by this Court from proceeding in the action of trover. And I think it is quite clear, that they should be prevented from continuing such action; for if they have any title, it is by a mere slip of the petitioners, in not averring in their petition the time when notice was given by them of the deposit of the policy. As the petitioners have undertaken to abide by the order of the Court, if the assignees, therefore, have any case against them on account of the notice being defective, or any right to claim the 35*l.* received by the petitioners, they can apply by petition in the ordinary way to this Court. But they ought not to go on with the action.

Sir J. Cross.—The Commissioners have sanctioned the course of proceeding taken by the petitioners; for they have adopted the arrangement made by the latter with the Insurance Office, as to the value of the policy, by admitting the petitioners to prove for the balance of

1835.

Ex parte
Booth.

their debt, after deducting the sum received for the value of the policy from the Insurance Office.

Sir G. ROSE.—It appears to me, that there is sufficient proof in this case, that notice was given by the petitioners to the Insurance Office of the policy being deposited with them by the bankrupt; for they state generally, that the office had notice of the transfer; and this the assignees have not ventured to deny. The decision, however, which the Court has come to on the present occasion, will not prevent the assignees from taking any further proceedings in this Court; if they think they can make any thing of the point, as to the deficiency of the notice. But the Court, I think, is bound to stop the pending action.

Ordered as prayed, and that the costs of the petitioners, as well as those of the assignees, should be paid out of the estate.

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Ex parte CHARLES PRATER and MICHAEL ATKINS.—

In the matter of JOHN HARLEY.

Westminster,
January 21.

An order made by the Court, sanctioning a pecuniary arrangement effected by the assignees.

THE petitioner, *Prater*, was the surviving assignee of the above-named bankrupt, and the petitioner, *Atkins*, had become the purchaser of a debt proved under the commission. The petition was presented under the following circumstances:—

The commission issued in April 1816; upon which the assignees seized and sold certain household furniture and effects as the bankrupt's property, which

John Nestor claimed to belong to him, and in May 1824, brought an action against *Prater*, as surviving assignee, to recover the value of this property. On the 5th June 1824, *Prater* obtained an order to stay the proceedings in the action until *Nestor* gave security for costs, he being then resident out of the jurisdiction of the Court; under which order the action and all further proceedings therein were stayed until *Nestor's* death, which happened on the 22d September 1832, he never having given the required security. One *James Egan* took out administration to *Nestor* with the will annexed, and became therefore his legal personal representative.

1835.

Ex parte
PRATER
and another.

At the time of his bankruptcy *Harley* was indebted, amongst others, to *Thomas* and *Fennell*, of Limerick, in the sum of 1117*l.* British currency, who duly proved the same under the commission. *Thomas* and *Fennell* having afterwards themselves become bankrupts, the outstanding debts due to their estate, and amongst them the debt so due to them from the bankrupt *Harley*, were, by order of the Commissioners, put up to sale by public auction; when *James Keane* was declared the purchaser thereof, at the sum of 600*l.*, and the debts were assigned to him accordingly by the assignees of *Thomas* and *Fennell*. *Keane* never received any dividend on the debt so due from the bankrupt *Harley* to *Thomas* and *Fennell*; and having become indebted to the petitioner, *Michael Atkins*, *Keane*, in consideration of being so indebted, and of a further sum then paid to him by *Atkins*, assigned and made over unto *Atkins* all his claim upon the estate of *Harley*, in respect of the debt due from *Harley* to *Thomas* and *Fennell*.

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Ex parte
PRATER
and another.

The petitioner, *Prater*, had been prevented from making any final dividend of the estate of *Harley*, by reason of the action brought by *Nestor*; but being desirous of winding up the estate, suggested to *Atkins* the propriety of his endeavouring to effect some arrangement with *Egan*, the administrator, in regard to such action. In pursuance of this suggestion, *Atkins* accordingly made an arrangement with *Egan* as to the discontinuance of such action; and by a deed poll under the hand and seal of *Egan*, it was witnessed, that in consideration of the sum of 50*l.* paid to *Egan* by *Atkins*, with the privity and approbation of the petitioner *Prater*, *Egan* released the petitioner *Prater*, as such assignee as aforesaid, from the action so brought against him by *Nestor*. The petition then stated, that *Atkins* advanced and paid this sum of 50*l.* out of his own pocket for the purpose of obtaining a final dividend to be made of the estate of *Harley*, relying upon the justice of this Court in directing that this sum should be repaid to him out of the estate of *Harley*.

The petitioners prayed, that this arrangement might be sanctioned by the Court, and that the 50*l.* might be repaid to *Atkins* out of *Harley's* estate, together with all the costs of the release and of this application.

Mr. *Swanston* appeared in support of the application.

The COURT made the Order as prayed; observing, that if the petitioner, *Prater*, had advanced the money, and had repaid himself out of the bankrupt's estate, such payment would have formed a disbursement in his accounts, which the Commissioner would, under the circumstances, have allowed.

Ex parte WILLIAM HETHERINGTON.—In the matter of
JOSEPH GLOSSOP.

1833.
Dec. 16, 20, 21.
1834.
January 13, 16.
1835.
June 17.

IN this case a petition, which was answered for the 9th December last, was presented by the petitioner, *Hetherington*, praying that the allowance of the bankrupt's certificate might be stayed, (it having been advertised for allowance in the London Gazette on the 8th November,) on the ground of his having lost 20*l.* and upwards by gambling, and being therefore within the 6 Geo. 4. c. 16. s. 130.

Affidavits referred for scandal on motion of course.

On this day, Mr. *Chandless*, for the petitioner, moved to refer certain affidavits, which were filed by the bankrupt in answer to the petition, for scandal, and cited *Ex parte Williamson (a)*.

December 16.

The COURT ordered this, as a motion of course.

On this day, Mr. *Bligh*, on behalf of the bankrupt, applied for leave to file a short cross-petition for the allowance of the certificate, and that it might be heard to-morrow, stating that the other petition had only been served one day before that for which it had been answered, whereby the service was bad: two clear days being the required service of a petition to stay a certificate.

December 20.
A cross-petition by the bankrupt for allowance of the certificate, will not be advanced on motion of course, pending the reference for scandal, of affidavits filed in answer to the petition to stay the certificate, on the ground that the latter petition was improperly served.

The COURT observed, that the petition might have been heard before this, except for the circumstance of the pendency of the reference for scandal, and that the

(a) 1 Dea. & Ch. 529; 2 Dea. & Ch. 414.

1833.

Ex parte
HETHERING-
TON.

delay was caused by the bankrupt's own conduct. It was therefore a question, whether the bankrupt ought to be heard.

Mr. *Bligh*. The complaint of scandal does not arise on the part of the person alleged to be scandalized, and therefore the order of reference was improperly obtained. In *Ex parte Pelham (a)*, it would appear to be necessary that the party affected by the scandal should himself apply.

Contrary to *Ex parte Pelham* (Mont. 211), held, that any party may apply to refer affidavits for scandal, and that the application need not be by the party scandalized.

Sir G. ROSE.—That is a mere dictum of the Vice-Chancellor's, against which there is the dictum of Lord *Eldon* in *Ex parte Simpson (b)*. Every person is interested in seeing that the records of Courts of Justice be kept pure and free from scandalous allegations; and I have always understood, that any party, at any time, may apply to have such matters expunged.

ERSKINE, C. J.—The main question is, the insufficiency of the service. If that is made out, the other objections need not be had recourse to. But notice of the application must be given, and therefore it had better be renewed to-morrow.

December 21.

As a general rule, a petition to stay certificate must be served on bankrupt two clear days before the day for which it is answered. But where a petition to stay certificate was answered for the 9th December, and on the 7th the bankrupt's solicitor requested the petitioner's solicitor to postpone the hearing of the petition for a week, and undertook to serve it on the bankrupt; *semble*, the bankrupt could not avail himself of the objection to service.

Mr. *Montagu* and Mr. *Bligh* now moved, pursuant to notice, that the petition to stay the certificate might be dismissed, on the ground of the informality of the service. It is a rule, always most strictly adhered to in bankruptcy, that a petition to stay a certificate must be served at least two clear days prior to that

(a) Mont. 211.

(b) 15 Ves. 476.

for which it is answered, or the neglect is fatal to it. It is also requisite that it should be served personally; *Ex parte Hopley* (a), *Ex parte Coulbourn* (b), *Ex parte Bosanquet* (c). The strictness with which this rule has always been observed, is singular in the annals of bankruptcy. Even the admission of the subsequent receipt and possession of the petition, if it was not personally served, is not a satisfaction of it; *Ex parte Furnival* (d). Nor does the filing of affidavits in answer, or an application on the part of the bankrupt to have the petition advanced, purge the objection; and no act of the bankrupt's amounts to a sufficient waiver of it; *Ex parte Kendall* (e), *Ex parte Harford* (f), *Ex parte Groome* (g). The bankrupt has presented his cross-petition, for the allowance of his certificate, under the authority of *Ex parte Moore* (h), and *Ex parte Brenchley* (i), though that course does not seem to be strictly necessary, *Ex parte Hopley* (a).

1833.
—
Ex parte
HSTERRING-
TON.

Mr. Chandless. The solicitor for the petitioner, and one of his clerks, have made an affidavit, showing that the petition to stay the certificate was presented on the 29th November last, and was answered for the 9th of December. That on the 29th November, and immediately after the petition was answered, the deponents wrote a letter to Mr. *Braham*, the solicitor for the bankrupt, as follows: "We beg to inform you, that we have presented a petition (this day) to the

(a) 1 Gl. & J. 63; S. C. 2 Jac. & W. 220.

(b) 2 Rose, 187.

(d) 1 Gl. & J. 254.

(f) Buck. 38.

(h) 1 Gl. & J. 263.

(c) 1 Mont. & Greg. Dig. 161.

(e) 1 Ves. & B. 543; S. C. 2 Rose, 116.

(g) Buck. 39.

(i) 1 Mont. & Greg. Dig. 161.

1833.
Ex parte
HETHERING-
TON.

Court of Review, to stay the allowance of the bankrupt's certificate; and as the order of attendance thereon is Monday, 9th December next, and personal service on the bankrupt is necessary, you will perhaps, appoint a time when some gentlemen from our office may serve the bankrupt, so that the hearing of the petition may not be delayed. We do not know where the bankrupt is to be found." In answer to this letter, the deponents, on the 5th December instant, received a letter from Mr. *Braham* as follows:—"In consequence of a death in my family, I am precluded attending to business; I therefore shall esteem it a personal favour by your applying to the Court of Review, for a week's further time to answer the petition herein." On the 4th December instant, the clerk of the petitioner's solicitors went to 34, Gerard Street, Soho, (which he had been informed was the residence of the bankrupt), and there inquired for the bankrupt, and was then told by the man-servant, that the bankrupt seldom came there; that he had not slept there for several nights past; and that he could not tell where the bankrupt could be found, but that a person whom he did not know came occasionally for the bankrupt's letters. On the same day, the clerk also called upon Mr. *Phillips*, a friend of the bankrupt, and inquired of him the residence of the bankrupt; but Mr. *Phillips* refused to inform the deponent where the bankrupt was, or where he was to be found, although Mr. *Phillips* at the same time stated to deponent, that he knew where the bankrupt was to be found, but he would not tell. On the 5th December instant, he also called at the office of Mr. *Braham*, in New Inn, and inquired the residence of the bankrupt, and the deponent was

again informed that Mr. *Braham* did not know where the bankrupt's residence was, or where he was to be found. On the same day, the deponent called on a Mr. *Barham*, who had been employed as the accountant of the bankrupt, for the purpose of ascertaining the address of the bankrupt, and was in like manner informed that it was not known where the bankrupt was to be found.

1833.
Ex parte
HETHERINGTON

Under these circumstances, I contend that the objection to the service cannot be entertained, the informality having arisen from the acts of the bankrupt's own solicitor (a).

ERSKINE, C. J.—(After recapitulating the facts sworn to in the foregoing affidavit,)—There can be no doubt as to the general rule requiring two clear days' personal service of this kind of petition; but the counsel for the bankrupt argue it too strongly, when they contend that no state of circumstances,—no conduct whatever on the part of the bankrupt, can induce an exception to it. None of the cases cited go to any such length, and in none of them does it appear that the delay of service arose, as in this case, from the conduct of the bankrupt himself, or of his solicitor. Besides the facts disclosed in the affidavit, it further appears, that on the 5th of December Mr. *Braham*, the bankrupt's solicitor, called personally on Messrs. *Lawrence* and *Blenkarne*, the solicitors of Mr. *Hetherington*, and requested that the

(a) The above affidavit was sworn before a Master in Chancery, and a question arose as to whether it ought not to have been sworn in the Court of Review, or in the Commissioners' Court, but the *Chief Judge* expressed his opinion that there could be no doubt as to the sufficiency of that mode of swearing affidavits.

It is no objection that an affidavit is sworn before a Master in Chancery.

1833.

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Ex parte
HARRINGTON.
1833.

petition should be allowed to stand over, on the grounds mentioned in the letter, which was written as an evidence of the transaction at the request of Messrs. *Lawrence* and *Blakarne*, and Mr. *Braham* verbally agreed to serve his own client with the petition. I therefore think that it would be too great a sanction to fraud, and it would strike at the root of all professional integrity, if we were to sanction the present application; and that the circumstances do not warrant us in taking the petition out of its turn to favour the views of the bankrupt.

Sir JOHN CROSS.—The first step towards delay originated with the bankrupt's solicitor himself, who, on his own account, and on his own responsibility towards his client, asks that the hearing of the petition may be postponed for a week, and undertakes to serve it. This takes place on the 7th, the petition being answered for hearing on the 9th; and, as the service must be considered as made on the 7th, and the petition, by the arrangement, as answered for hearing on the 16th, seven days after the 9th, the service was virtually nine days before the day of hearing. I can see no just grounds for sanctioning the bankrupt's present application.

Sir G. ROSE.—The Court has always been indulgent to bankrupts, in regard to the certificate, where they have conformed themselves under the commission, and there is always an inclination against any delay of the certificate. No doubt exists as to the general rules of serving these petitions; but all general rules are capable of an exception, and I think this is one. This too is a very

different case from that of a petition being brought on in its regular course; for here the bankrupt comes for a favour, and asks the Court to sanction that conduct on the part of his solicitor, which would amount to a moral fraud. When the petition comes on in its regular course, it will then be competent to us to decide as to the validity of the service, but we cannot do so now under such circumstances as these. At the same time I should remark, that although a general rule may exist, that a bankrupt cannot waive the objection to service in this kind of cases, that rule has been adopted rather than to allow any advantage to be taken of a party, favoured, as I have already observed, by the Court, who in all probability is ignorant of the prejudice such waiver may bring upon him, being uninformed of the protection which the bankrupt laws have cast round him in regard to these petitions. But where professional advisers are interposed, and they make arrangements on behalf of their clients, acting with their eyes open, and aware of all the legal consequences, we must pause before we decide that a waiver by them will not take the case out of the otherwise positive rule. It is not now necessary for us to decide this point, though the inclination of my opinion is that the service is sufficient.

The motion was therefore refused with costs, as against the bankrupt; but the order for payment was suspended till the hearing of the petition to stay the certificate.

Mr. *Chandless* now moved to confirm the registrar's report, as to the scandalous matter contained in the bankrupt's affidavits.

1833.

Ex parte
HETHERING-
TON.

January 13.

Motion to confirm report as to scandal in affidavits, is a motion of course.

1834.

Ex parte
HETHERING-
TON.

January 16.

Where on petition to stay certificate petitioner does not appear, and petition is dismissed, certificate not ordered to go without the production of an affidavit that there is no collusion.

The Court made the order, observing, that it was a matter of course, and required no notice of motion.

This day the petition to stay the certificate was called on in its regular turn, but no counsel appeared to support it.

The COURT, on the application of Mr. *Montagu* and Mr. *Bligh*, ordered the certificate to go, upon production at the office of the usual certificate of there being no collusion, but refused to order it without (a).

1835.

June 17.

Service of petition to stay certificate not properly supported, where affidavit merely states inability to serve bankrupt personally, but that bankrupt's solicitor had acknowledged bankrupt to be fully aware of petition and its nature.

Ex parte LEVY, in the same Bankruptcy.

This was another petition to stay the same bankrupt's certificate, and Mr. *Montagu* proceeded, in support of it, to read the affidavit of service, which merely stated an inability to serve the bankrupt personally, but showed that his solicitor had acknowledged that the bankrupt himself was fully acquainted with the petition being presented, and its nature.

This the Court, without hesitation, declared an insufficient service, and the certificate was allowed.

(a) See *Ex parte Gibson*, 6 Ves. 5; re *Hall*, 2 Dea. & Ch. 44; S. C. Mont. 508.

Ex parte JOSEPH DE BEGNIS, JAMES DENEW, JAMES CADBURY, and others.—In the matter of CHAMBERS, GRAINGER, and CHAMBERS.

1834.

Westminster,
January 13.

THE petitioners, being creditors of the bankrupts, presented a petition alleging, amongst other things, that the bankrupts had a valuable leasehold interest in the Opera-House, of which a sub-lease had been granted by the assignees to Mr. *Laporte*, at the yearly rent of 13,250*l.* per annum, from the year 1832 for the term of three years, upon the terms following; viz. that 4000*l.* should, each year, be paid in advance on account of each year's rent,—that a sub-lease of the boxes should be made by *Laporte* to a trustee for the assignees, the profits of which were to be applied in reduction of the rent,—and that other securities should be entered into by *Laporte*, for the due performance of the covenants in the lease.

On the 17th August 1833 *Laporte* presented a petition to this Court, stating that 11,250*l.* was then due on account of the rent, for payment of which the assignees held security to the amount of 10,000*l.* only, and praying that it might be referred to Mr. Commissioner *Holroyd* to inquire whether it would not be beneficial to the bankrupt's estate, and to the interests of the theatre, that an abatement of the rent should be made for the first season of the lease, and that for the residue of the term the rent should be reduced to 10,000*l.* per annum. By an order, dated the 21st August, this reference was directed, the petitioners being wholly ignorant of the proceeding. On the 11th September a private meeting was held before the Com-

An *ex parte* order was obtained by the tenant of the assignees, to refer it to the Commissioner to ascertain if a reduction of his rent would be beneficial to the bankrupt's estate. The Commissioner certified that it would, and that another person had tendered a higher rent than that to which he proposed to reduce the original rent. An application was made to confirm the certificate. A petition was presented by creditors, one of whom had offered the higher rent, to discharge the order of reference and the Commissioner's certificate. But the Court refused to interfere, leaving the petitioners to their remedy against the assignees, if they were aggrieved, as their rights were not bound by the proceeding, and as they were no parties to the order. Sir J. Cross dissent.

1834.

Ex parte
De Begnis
and others.

missioner, at which Mr. *Laporte*, and Mr. *Seguin* the box-keeper, were severally examined. Mr. *Johnston*, of the firm of *Mayhew* and *Johnston*, as solicitors for the assignees, attended the meeting, but took no part in the examinations. Mr. *Green*, on behalf of the petitioner *De Begnis*, also attended to make the offer hereinafter alluded to. The Commissioner made his certificate as follows:—

“ I hereby certify, that in my opinion it would be beneficial to the bankrupt's estate that the rent of the theatre for the first season, and for the residue of the petitioner's lease, should be reduced to the sum of 10,000*l.* per annum, provided the petitioner can procure good security for the payment of such rent to the assignees ; but I think a sub-lease of the boxes would not be a proper or sufficient security. I think it would be advisable for the assignees to take advantage of the forfeiture of the lease that has been or may be incurred by the petitioner, by the non-payment of the rent, and to tender the theatre again for letting to the highest bidder, who can procure the highest security. During this inquiry, it was stated to me by a solicitor, that a client of his would give 11,000*l.* per annum for the theatre, with good security for the payment of the rent ; but, from the evidence adduced before me in relation to the management of the theatre from 1828 to 1833 inclusive, and the receipt and expenditure during that period, it does not appear to me that a higher rent than 10,000*l.* will afford a fair remunerating profit to a lessee, after paying all expenses. Had the rent been 10,000*l.* per annum for the years 1828, 1829, 1830, and 1831, the average annual profit to the lessee, after paying all costs, would have been about 2100*l.*”

Soon after this a negotiation, which was for some time pending, was entered into between the official assignee, the solicitor for the assignees, and the solicitor for Signor *De Begnis*, for the purpose that the latter should become the tenant; and measures were had that the assignees might take advantage of the forfeiture of the lease by *Laporte*. Finally, *Laporte* filed his bill for an injunction, and for relief against the forfeiture occasioned by the non-payment of the rent. An injunction was obtained, and it was understood that the assignees would proceed to take steps to dissolve it: but while the means of doing so were under discussion, Mr. *Laporte*, on the 7th November, presented a petition to this Court, praying that the Commissioner's certificate might be confirmed, and that it might be declared for the benefit of the estate that the rent should be reduced to 10,000*l.*, pursuant to the terms in the certificate. The assignees represented that they would oppose the petition, so that the petitioners did not watch the proceedings. The petition, however, was advanced for hearing, and was brought on on the 21st November, when, no opposition being offered to it, the prayer was in effect granted, and it was referred to Mr. *Gregg* to settle a proper lease. The drawing up of that order was however suspended, to abide the result of the present application. No meeting was ever convened for taking the opinion of the creditors, as to the propriety of the compromise with *Laporte* as to the arrears of rent. The petition then stated various facts to show that Mr. *Laporte* was insolvent, and alleged that it was injurious to the estate to continue him any longer as tenant; it also stated *De Begnis's* willingness to become lessee at 11,000*l.* per annum, and to deposit 5500*l.*, and to give other secu-

1834.

Ex parte
De Begnis
and others.

1834.

Ex parte
De Buzonis
and others.

rities: and it proceeded to pray that the order of the 21st August might be rescinded—that the Commissioner's certificate might be declared erroneous on the face of it (except that part relating to the forfeiture)—and that it might be discharged—or that it might be referred back to the Commissioner to review his certificate, with consequential directions.

Mr. *Temple*, and Mr. *O. Anderdon*, for the petitioners. The order of the 21st August is that of which we principally complain; and we do so upon two grounds, viz. the one, that it tends to sanction a compromise of a debt due to the bankrupt's estate, no meeting having been convened so as to obtain for such compromise the sanction of the creditors, according to the provisions of the statute (*a*); and the other objection being, that it is contrary to all practice to make any such orders in any case upon the application of the tenant himself, but which has been done in the instance now before the Court. The meeting on the 11th September was a mere private meeting before the Commissioner. At that meeting Messrs. *Seguin* and *Laporte* were indeed examined, but no evidence was tendered on the part of the assignees, or of the creditors. Mr. *Johnston*, the solicitor to the commission, attended, but he did not interfere: so that the Commissioner made the order, as it were by consent, instead of exercising his judgment upon the merits, which he would have felt himself bound to do under a different state of circumstances. [Sir *J. Cross*. The Commissioner must have considered himself as sitting for the benefit of the general body of creditors, and as having to exercise his judgment

(a) 6 Geo. 4. c. 16, s. 88.

on their behalf, though they were absent from the meeting.] Perhaps so; but he was misled by the state of circumstances, thinking that the non-interference of the solicitor present was a sufficient justification for the order. It is impossible that the Court could sustain this order on the merits alone, in the first instance, had not the order been (and, as we contend, improperly,) obtained. Lord *Eldon*, in his time, would never listen to a tenant coming for a reduction of his rent. In lunacy, in the case of *Ex parte Town (a)*, the Court refused to direct a reference to the master as to the reduction of rent upon the petition of the tenant; and in *Ex parte West (b)*, it was directed, that all future applications of this nature in lunacy should be by the committee, and that the inquiry should, in addition, be whether it would be more beneficial that the lease should be surrendered. Had the assignees pressed the forfeiture of the lease, on the ground of non-payment of the rent, no one would pretend to say that Mr. *Laporte* could have obtained any relief which he sought by his bill, without, as a preliminary, paying up all arrears. But here he has obtained a double advantage. His arrears are remitted, and his rent in future is reduced.

The order is, *per se*, improper, and is moreover improperly obtained; and, on these grounds, we submit, it ought to be discharged.

Mr. *Swanston*, Mr. *Montagu*, and Mr. *Jacob*, for the assignees. The question is not so much, whether the order ought originally to have been made, as whether, being made, the Court, with a knowledge of all the cir-

1834.

Ex parte
Dr BROWN
and others.

(a) *Turner & Russ*. 137.(b) *Id.* note.

1834.

Ex parte
De BEONIS
and others.

cumstances, will discharge it, and especially on the application of the present petitioners.

However the argument against the validity of the meeting might have been entertained formerly, a different view is now taken of the effect of the want of consent to the commencement of a suit, or the compromise of the creditor's rights by assignees. In several cases upon bills filed by assignees, it had been held that a suit could not be maintained, if the previous consent of creditors were not obtained in the manner pointed out by the 6 *Geo.* 4. c. 16. s. 88. The more recent decisions, however, show that the Courts, and this Court in particular, regard it rather as a question of the responsibility and indemnity of the assignees personally between themselves and the creditors. It is now held, that if they have obtained such previous consent, then, no matter how improvidently a suit may be instituted, they cannot be held responsible. But if, on the other hand, they act so improvidently as to proceed without such previous consent, the Courts then inquire whether the assignees should and ought under the circumstances to be held responsible in regard to costs for the event of the suit, or whether they shall be held accountable for the effect of a compromise; and it is not now regarded as an objection to the suit itself, of which a defendant can avail himself (a). In accordance with this principle, we contend that even if there were any reason to complain of what has been done, the objection does not lie against the order of the Court: but a remedy must be sought against the assignees personally, who, without

(a) In the case of *Ex parte Evans*, 3 *Dea. & Chit.* 476, Sir G. Rose recognizes this principle; and there most of the cases on this subject are collected.

previously calling a proper meeting to obtain the sanction of the creditors, have adopted a course which the Courts hold them empowered to pursue at their own risk, if they will take upon themselves the responsibility. Instead, therefore, of seeking to annul the order of this Court, the proper remedy for the creditors would be, if there existed any ground for it, to file a bill against the assignees, charging them with wilful default in their mode of administering the assets; upon which the Court would be enabled to go into the merits, and thereby be enabled to say whether in the present case the reduction of the rent, and the continuance of Mr. *Laporte* as tenant, warrant the conclusion of improperly administering the assets. As to the merits, the petitioners have no just ground to complain. In managing the estate, especially such as this is, it is the duty of the assignees not merely to look to the abstract question of how much rent they can obtain at the present moment, but to that which is best for the ultimate benefit of the creditors. It does not follow, because one man offers a higher rent than another, that therefore he is a better tenant, or that his tenancy will prove more permanently beneficial to his lessor. So in this case, as the keeping this theatre open and at the same time well conducted, is of the first importance, it is possible to conceive that the Commissioner (having, as he evidently has done from his report, gone fully into the consideration of this point, and stated some of his reasons for the conclusions he has arrived at) has rightly reported, that it is most for the benefit of the estate that Mr. *Laporte* should continue tenant at the reduced rent.

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Dr. Brown
and others.

Mr. *Twiss*, and Mr. *Keene*, for Mr. *Laporte*.

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Mr. *Temple*, in reply. The Court could not pronounce the order in question, if the merits alone were now before it; and under the circumstances, the order which has been made amounts in value to mere waste paper, because the parties most deeply interested were not properly represented before the Court when the reference in question was directed. The other side say that the Commissioner's opinion ought to be sustained, and that, on the merits, the creditors will be more benefited by accepting Mr. *Laporte* as the tenant at 10,000*l.* per annum, than by the adoption of Signor *De Begnis* at the rent of 11,000*l.* per annum. No doubt is thrown on the securities tendered by either party. It is difficult therefore to see how the creditors will ultimately profit by that which amounts to a clear loss of 1000*l.* per annum; and yet this is the amount of the argument against the present petition. [*Erskine*, C. J. I should wish to know what right Signor *De Begnis* has to call upon the Court to adopt him as the tenant, superior to that which Mr. *Laporte* has?—and what interest have the petitioners, who were not parties to the order, and whose rights are not proposed to be bound by it, to present this petition? Would it not be better that their rights should be left untouched, rather than that we should make any order on their petition?] The answer is already given, namely, that if Mr. *De Begnis* is adopted, it will put 1000*l.* per annum into the creditors' pocket; otherwise they will lose that sum annually. Besides, the creditors are interested in every order made in the particular bankruptcy under which they prove: and although it may be said the order, as regards the creditors, is mere waste paper, yet it is desirable that no order of this kind should

stand in their way; and, seeming to sanction the act of the assignees, thereby perhaps to prejudice them on some future occasion, when they may think fit to come forward and tender their complaint against the assignees for the unwarranted compromise of the creditors' rights, which they, the assignees, have entered into.

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ERSKINE, C. J.—When the first application for an order like that complained of by the present petition was made to this Court, the objections which have been so ably urged at the bar to-day presented themselves to my mind, and rendered me unwilling to interfere, even by ordering a reference to the Commissioner; because I felt that if the report should be favourable to the proposed arrangement, no efficient order could be grounded upon it; for if the arrangement were really beneficial, the assignees required no such sanction; and if it turned out so improvident that they would, by making it without a reference, subject themselves to personal responsibility for the loss, the order of this Court would not protect them against the complaint of an adverse creditor. But I was told, that the object of the reference was merely to protect the assignees from the charge of having secretly and collusively compromised the interests of the creditors, and to record the circumstances under which the arrangement had been entered into; that similar orders had been made by those who preceded us in the administration of bankrupts' estates; and thus the reference was ordered. When the order, which now rests in minutes, and which is one of the subjects of the present complaint, was under discussion, I felt the same unwillingness to interfere. But as it seemed a mere matter of course,

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to confirm a report that had been made by the direction of the Court when not objected to, the Court pronounced that order; though I confess I should have been better satisfied, if it had not extended beyond the mere confirmation of the certificate, leaving the assignees to act upon it or not, as they pleased, without even the semblance of a direction from the Court. But I do not consider the question now before us, as involving our approbation of the arrangement suggested, or even of our former order. My judgment, at least, turns on no such point, but only upon this question, whether we ought to interfere to rescind the original order of reference, or disallow the certificate, or vary the minutes of the last order, upon the application of the now petitioners. And, being of opinion that the interests of the petitioners, as creditors, are not at all affected by these proceedings, I think we ought not to give a seeming value and importance to orders of this nature which do not belong to them, by admitting them to be the proper subjects of adverse litigation; and most especially as the interests of creditors are expressly reserved in such orders, when formally drawn up. I think therefore that the petition should be dismissed; but as the Court is not unanimous in this decision, and as the petitioners may have had some excuse for their apprehensions, in the absence of the reservation of their rights in the minutes, I think it should be without costs. The costs of the assignees must be allowed out of the estate.

Sir JOHN CROSS.—As my opinion of what ought to be the result of this application differs from that which has just been expressed, I feel it right to observe, that

there is nothing before the Court which in any way tends to impugn the moral character, or the motives, of the assignees in this case.

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The petition prays that the original order of reference may be discharged, together with the order confirming the certificate, or that the Court will refer it back to the Commissioner to re-consider the matter. It is urged, for reasons I need not repeat, that the order is defective on the face of it, and therefore that if allowed to remain on the proceedings, it will amount to a mere nullity. In answer to which it is said, that for that very reason we need not interfere, inasmuch as if it is a nullity, it can work an injury to no one. I should be sorry to see any of our proceedings considered of so little importance as to render it immaterial whether we adjudicate upon any matter or not. But taking the order as it stands, my difficulty is this. We direct a common reference to the Commissioner to ascertain and report whether it will be for the benefit of the *creditors*, not of the tenant, that the rent shall be reduced. The Commissioner certifies that it will be for their benefit that the reduction should take place. But his certificate goes on to shew, that another party has offered terms higher than those to which the rent is proposed to be reduced; and then he states that he has rejected the offer, because, if it were accepted, the party offering it, that is, the tenant, could not make a sufficient profit. For whose benefit then does the Commissioner propose that the sufficiency of profit should be provided for? The answer is, for the tenant's. Is it not therefore inconsistent that the Commissioner should so report, when he was directed to ascertain what would be most advantageous to the creditors? I cannot view it in any

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other light; otherwise, if Mr. *Laporte*, who is proposed to be accepted as the tenant at 10,000*l.* per annum, were to come forward and offer 11,000*l.*, it would be just as proper for the Commissioner to say, "No; we will not take more than 10,000*l.*, because you cannot otherwise make sufficient profit." If the securities offered by Signor *De Begnis* had been objectionable, it would have been another matter; but as it is, we must throw the securities offered on both sides out of the scale, and view them as equally good and available.

There appears to me so much inconsistency in this, that I think we ought to discharge the order, or at least refer it back to the Commissioner. When the Court ordered the confirmation of the certificate, it did so because no parties appeared to oppose it, the assignees appearing and in effect consenting. The Court then referred it to Mr. *Gregg*, to settle the lease; but on the application of the creditors, the drawing up of the confirming order was suspended, and the present petitioners now appear, and embark their rights; and it will appear on our records, in addition to the above certificate, that they have done so. I therefore think we should now consider the matter as though no order had ever been made. It cannot be said that the petitioners have no interest in discharging this order. Who are they, other than the assignees' *cestui que trusts*, interested to the amount of 1000*l.* per annum? I may be allowed to add, that I think, on another ground, the creditors are justified in presenting this petition. In the order complained of, there is nothing which has the semblance of a reservation of their rights. It strikes me that the order ought to have

been drawn up expressly with that view; and that not being so, they are justified in demanding of the Court the insertion of that, which the officer who drew the order would not be justified in adding without the express sanction of the Court. I regret, then, that I am under the necessity of differing from the opinion already expressed by the Chief Judge.

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Sir G. ROSE.—I cannot see any difficulty in this case, when it is properly considered. In the way in which this sort of case is looked at the present day, the assignees have a right to exercise a discretion as to the mode of dealing with the assets. No one will dispute but that in general the office of assignees is constituted for the purpose of avoiding that inconvenience, which would result from the perpetual necessity of consulting every creditor upon every little point that might arise, as to the best course to be adopted in the administration of the bankrupt's affairs. The assignees are the trustees appointed by law, and are invested with all legal rights as actual owners of the property entrusted to them. The statute, indeed, directs in the 88th sect. that, with the consent of creditors, obtained at a meeting to be appointed for that purpose, the assignees may do certain acts; and many cases have gone the length of determining, that a suit instituted without such consent, is invalid, and that the bill is liable to a demurrer, or a plea, unless it appears that the consent has been obtained in the manner I have alluded to. But the Court, seeing the inconvenience that may result from that principle of decision,—seeing that it gives an unjust advantage to the debtor to the bankrupt's estate, to be allowed thus to thwart the remedies

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instituted against him to recover that which he may justly be bound to pay,—have of late inclined to consider the absence of such consent no objection to the assignees proceeding in such cases; and that, if the creditors are injured by the mode in which the assignees exercise their discretion, a remedy is open to them against the assignees; and Courts of Equity are always ready to determine whether they have exercised their discretion fairly and honourably, or whether they have acted so indiscreetly, as to render them liable to make compensation to the creditors for the consequences. The same observations will equally apply, whether the subject be a suit instituted, or a compromise entered into.

With respect to the order complained of, it is nothing more than a proceeding to show that the assignees have acted without collusion. They have, in their discretion, sanctioned Mr. *Laporte's* proceedings,—they have not opposed the Commissioner's finding, and are willing to grant the lease to Mr. *Laporte* at the reduced rent. This they do at their own responsibility. The creditors are in no ways injured, nor are their rights in any ways lessened or bound, by what has taken place,—and the order of reference, and all the proceedings on it can at best be taken, *quantum valeant*, to show that there has been no unfair dealing. But still it is open to the creditors to show they have acted unwisely, and if they succeed in making out that charge, nothing that has yet transpired will tend to screen the assignees from the consequences of it.

The question then is, whether we ought to make any order on the petition now before us? The assignees are about to exercise a discretion, I think, wisely

left to them, and I question whether we have any jurisdiction to control them. If, indeed, a profligate and flagrant disposition of the bankrupt's assets were in their contemplation, this Court, as well as any other Court of Equity, might enjoin that which would tend to irreparable waste. The case before us, sanctioned as it at present is by the Commissioner's report, does not *primâ facie* warrant our summary interference, nor would any Court grant an injunction under such circumstances. I say, again, what right have we, in a case denuded of fraud, to control the discretion of the assignees? Suppose the Court thought with the petitioners, that it would be proper that Signor *De Begnis* should become the tenant, (which is putting the strongest case in favour of the petitioner,) if the assignees were unwilling, what power should we have to enforce an order on them to accept him as such? None at all; and our order would amount to no more than an indication of our opinion. If the assignees were willing to accept him, it could merely give them a degree of confidence: but any dissentient creditor could at any future period question the whole proceeding, and it would come to the same question, whether they had wisely exercised their discretion. If the petitioners wish us to try that question, we cannot do it upon the present proceeding. The method for them to adopt is, either to petition for their removal, on the ground of their mal-administration of the estate,—or to file a bill, praying that they may account for that which they might have received, but for their wilful default. Either of those courses is open to the creditors. But knowing as much as we already do of the facts of this case, and feeling that the mere *quantum* of rent is not

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the only criterion to decide upon the adoption of this or that man as a tenant, I should advise them to adopt neither. At all events the present petition must be dismissed, but, in deference to the dissentient opinion of one of my colleagues, it must be without costs.

The petition was dismissed, but without costs.

The assignees to have their costs out of the estate.

Ex parte JAMES TUDOR LOMAS.—In the matter of
JAMES TUDOR LOMAS and FREDERICK COOKE.

Westminster,
June 2.

Under a joint and separate fiat the amount of each bankrupt's allowance is to be estimated, not upon the gross joint estate and his separate estate, but upon his share of the joint estate, together with his separate estate.

A bankrupt who has obtained his certificate loses his privilege as to costs.

THIS was the petition of one of the bankrupts, for his allowance; which, after detailing the facts contained in the former petition in this bankruptcy (a), proceeded to state, that by a certificate of Mr. Commissioner *Fane*, bearing date the 20th May 1834, and made in pursuance of the order of 29th April 1834 (b), he certified, that it having been admitted before him that the net produce of the joint estate of the petitioner and *Cooke* was 731*l.* 7*s.* 4*d.*, and it appearing to him that not more than one moiety of such sum could be deemed to have been the estate of the petitioner, within the meaning of the expression "his estate," in the 6 *Geo.* 4. c. 16. s. 128, the Commissioner had given credit to the petitioner for the sum of 365*l.* 13*s.* 8*d.* as the net produce of part of his estate; and that it being admitted before him, the Commissioner, that the separate estate of the petitioner amounted to 13*l.* 9*s.*, and that there

(a) 3 Dea. & Chit. 681.

(b) *Ibid.*

being no separate creditors of the petitioner, such sum was carried to the credit of the joint estate; the Commissioner had given credit to the petitioner for the further sum of 13*l.* 9*s.*, as the net produce of his separate estate, and had thereby ascertained the statutable allowance of the petitioner at 37*l.* 18*s.* 3*d.*, being ten per cent. upon 379*l.* 2*s.* 8*d.*, the amount of the above two sums. The petition prayed, that it might be declared that the allowance should be calculated upon the whole amount of the net proceeds of the joint estate, as well as of the separate estate of the petitioner; and the petition also prayed for consequential directions and costs.

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Mr. Ching, and Mr. Hetherington, appeared in support of the petition. The question here is, whether the bankrupt, under the construction of the 6 *Geo.* 4. c. 16. s. 128, 129., is not entitled to an allowance to be calculated on the whole of the joint estate, and not merely on a moiety. It is no longer a *vexata questio* that a full allowance is payable to each bankrupt under a joint commission; *Ex parte Gibbs* (a). In that case Lord Lyndhurst, in allusion to the cases of *Ex parte Bate* (b), and *Ex parte Powell* (c), and the former bankrupt acts, says, "I cannot but think that it was hastily assumed that there was but one allowance;" and, after having taken time to consider his final judgment, he says, "When this case was last before me I thought that there was but one allowance among all the bankrupts: but I have looked at the words of the act, and they are so precise and strong; that whatever may be my opinion of what was the intention of the legislature,

(a) *Mont.* 105.(b) 1 *Bro. C. C.* 458.(c) 1 *Mad.* 68.

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still I think each party is entitled to his allowance. The consequence is, that were there a partnership of forty persons, the amount of the allowance would be enormous. But the words are so strong I cannot get over them." And in the case of *Ex parte Morris* (a), it was held, that if A., B., and C. become bankrupts, and their joint estate pay 9s. in the pound, and the separate assets of A. and B. contribute sufficient to make a dividend of 15s. in the pound of the joint estate, but C.'s estate contributes nothing, yet that C. was nevertheless entitled to his full allowance. Again, in the case of *Ex parte Minchin* (b), where the commission was against three partners, and only one had paid a sufficient dividend to claim any allowance, it was held that he was entitled for his sole use to an allowance of five per cent. The decision of the Commissioner, therefore, is founded on an erroneous principle, in having calculated the petitioner's allowance on a moiety only of the net proceeds, instead of calculating it on the full amount.

Mr. Swanston, for the assignees. The circumstances of this case are very different from those of *Ex parte Gibbs*. In that case 20s. in the pound had been paid on the separate estate of each bankrupt, and there were sufficient joint assets in hand to pay the joint creditors also 20s. in the pound; so that there the amount of the two allowances did not exceed the amount of what each bankrupt was entitled to under his separate estate. In the case of *Ex parte Bate* (c), it was held that bankrupt partners, paying different proportions towards the liquidation of the debts, should have

(a) 1 Dea. & Ch. 526.

(b) Mont. & M. 135.

(c) *Supra*.

but one allowance, which should be divided amongst them in proportion to the payments made by their respective separate estates. This doctrine was also recognized by the Vice-Chancellor in *Ex parte Powell* (a). Both these cases were decided under the former Bankrupt Act of 5 Geo. 2. c. 30., the seventh section of which provides, "that all and every person and persons so become bankrupts, &c. shall be allowed the sum of 5*l.* per cent. out of the net produce of all the estate that shall be recovered." But in the 6 Geo. 4. c. 16. s. 128., the material words are, "if the net produce of *his estate* shall pay, &c." the bankrupt shall be allowed a per centage out of *such produce*. What then can be the meaning of the words "his estate" in the latter statute? If the argument in favour of the petitioner be correct, and the amount of allowance is to be calculated on the gross amount of the joint estate, with the addition of the petitioner's separate estate, the expression "his estate" must be interpreted to be the whole joint estate of the petitioner and his co-partner. It is absurd, however, to suppose that the legislature intended any thing of the kind in using that expression; since the words "*his estate*" can, with the greatest latitude of construction, only signify the amount of his separate estate, and the share he was entitled to in the joint estate. Had the intention of the legislature been to upset the decisions in *Ex parte Bate* and *Ex parte Powell* (b) by the 6 Geo. 4. c. 16., some more precise form of words would have been adopted in that act. [Sir J. Cross. Does not your argument tend to show, that to entitle a bankrupt under a joint commission to any allowance at all, his share of the joint estate must

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(a) 1 Mad. 70.

(b) *Supra*.

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be alone sufficient to pay 10s. in the pound, without the aid of the other partner's moiety in the joint estate? For the basis of your argument is, that "*his estate*" must have paid ten shillings in the pound. So that if, as in *Ex parte Gibbs*, 20s. in the pound is paid upon the joint estate, and there should happen to be more than two partners, none of the partners would be entitled to any allowance, because no one singly would have contributed 10s. in the pound.] The argument is not pressed to that extent, because it must be admitted that the 129th section provides for the allowance being payable to any one partner "if a sufficient dividend shall have been paid upon the joint estate (not the amount of his contribution to the joint estate) and upon the separate estate of such partner." But as that section does not fix the amount of the allowance, it becomes necessary to revert to the 128th section, and to consider the amount of the dividend which "the net produce of *his estate* shall have paid the creditors who have proved under the commission." For the 129th section neither extends, nor contracts, the allowance, but merely refers to the case of one partner obtaining his certificate, while another does not. The consequences would be monstrous in holding that each partner under a joint commission is entitled to an allowance on the whole joint estate. For supposing a partnership to consist of twenty persons, nineteen of whom were possessed of no capital in the business, and a dividend of 10s. in the pound is paid to the joint creditors out of the assets of the other partner, is every one of those persons who have not contributed a farthing towards the dividend, to be held entitled to an allowance of 5l. per cent. on the produce of the estate of the other partner?

Mr. *Ching*, in reply. The respondents have failed in their endeavour to get rid of the pressure of the case of *Ex parte Gibbs*. They say, that there both the joint and separate estates were so large, that it was not necessary to consider how the calculation was made, 20s. in the pound having been paid on both estates. But the allowance given by the 129th section is on the joint estate generally, and not on the moiety, or other portion of the joint estate which may have been contributed by one of the bankrupts; and, from what Lord *Lyndhurst* says in *Ex parte Gibbs*, it is impossible to come to any other conclusion than that each bankrupt must be considered to be entitled to his allowance on the full amount of the joint estate. The act says, that every bankrupt shall be allowed so much out of the net produce of his estate. What is the estate, then, but that out of which the dividend is paid? And why, if the creditors are paid full dividends, should the bankrupt be limited to half allowance? If the amount of the allowance is to depend on the contribution of what is, strictly speaking, "his estate," then, as has already been suggested by his Honor Sir *J. Cross*, in order to entitle a partner under a joint commission to any allowance, his share of the joint estate must have paid at least 10s. in the pound. And there is another difficulty in this mode of construing the act, namely, that in order to ascertain what part of the joint estate is that which is contributed by the partner applying for his allowance, it would become necessary to take the accounts as between the several partners; for *non constat*, that they are entitled in equal proportions.

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ERSKINE, C. J.—My present impression is, that the

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learned Commissioner has in this case formed a right construction of the statute, by the principle he has adopted in calculating the bankrupt's allowance. But as the question is one of some importance, and we are not at present entirely agreed in opinion, we will maturely consider it before we pronounce our final judgment. The view, however, which I now take of the case is this:—the 128th section of the Bankrupt Act appears to me to contemplate the bankruptcy of a joint, as well as of a separate trader. If the party is a sole trader, there can be then no question as to the estate from which his allowance is payable; nor does there seem to be more cause for doubt if he is one of several partners, who are the subjects of a joint commission; for "his estate" must be taken to consist of his own separate funds, added to his share of the partnership effects. The 129th section declares, that under a joint commission any one partner, who has obtained his certificate, is equally entitled to his allowance, if a sufficient dividend shall have been paid upon the joint estate, as well as upon his separate estate. Now it is not disputed in this case, that a sufficient dividend has been paid upon the joint estate, to entitle the petitioner to the rate of allowance claimed by this petition. But then the petitioner contends, that his allowance is to be calculated on the amount of the whole joint estate, added to his separate estate, provided it does not exceed 600*l*. It appears to me, however, that the fair construction of the act is, that the allowance to one of several partners under a joint commission is to be calculated on the amount only of his share of the joint estate, added to the amount of his separate estate.

Ex parte Gibbs (a) decided, that the sum of 600*l.* was what *each* partner was entitled to receive, when a sufficient dividend had been paid upon the joint and the separate estates, and that it was not to be considered as a maximum of the gross allowance among all the partners. And what Lord *Lyndhurst* there says, as to the enormous amount of the allowance where there happens to be a partnership of forty persons, has not, I think, the weight that has been attributed to his remarks on that occasion; for the imaginary case of forty bankrupt partners may be encountered by supposing, that the amount of the funds of the partnership is in proportion to the number of the partners.

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Sir J. CROSS.—I feel this to be a case of so much difficulty, that I am not at present prepared to give my opinion on it. The principle of calculation adopted by the Commissioner appears to me to be somewhat new, as I cannot find that there has been hitherto any precedent for this division of the joint estate. The chief difficulty of the Commissioner seems to have arisen from the expression in the statute of “his estate;” yet, according to his mode of calculating the allowance, it would follow, that the estate of this bankrupt has only paid 5*s.* in the pound, although he seeks his allowance as if he had paid 10*s.* in the pound. I wish, therefore, to have time to consider this question more deliberately.

Sir G. ROSE.—I, for one, cannot entertain a moment's doubt upon this question; nor have I any hesi-

(a) *Mont.* 105.

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tation in saying that I think the learned Commissioner has come to a right conclusion.

It is worthy of notice, that throughout the 6 *Geo.* 4. c. 16., except in the 129th section, there is no mention whatever of joint estate, *eo nomine*. The property of partners under a joint commission is administered under the General Orders of the Lord Chancellor in Bankruptcy, which were founded on an equitable power possessed or assumed by the Great Seal in the administration of a bankrupt's effects: and it is on this principle, that when a joint creditor is permitted to prove against the separate estate, he is restrained from receiving dividends until the separate creditors are paid in full. The 128th section of the statute is confined to the estate of the particular bankrupt who is the subject of the commission; and though a joint commission may issue against several partners, yet under that section alone no one partner would be entitled to any other allowance, than out of his separate estate. But the 129th section declares, that "if a sufficient dividend shall have been paid upon the joint estate, and upon the separate estate, of such partner, he shall be entitled to his allowance;"—from which words it has been contended, that the allowance is to be calculated on the whole of the joint estate, as well as on the separate estate, of each individual partner; which would be, in effect, to give the bankrupt two allowances, namely, one on the joint, and another on the separate estate. It seems clear to me, however, that the words "his estate," occurring in the act, must be taken to mean each partner's separate estate, and the amount of his share of the joint estate. I cannot go the length of agreeing with the counsel for the petitioner in the con-

struction they have put on the case of *Ex parte Gibbs*; which I think they are not warranted in carrying so far, from anything that dropped from Lord *Lyndhurst* on that occasion. Nor does the decision in *Ex parte Minchin* justify the mode of calculation they have attempted to set up in the present case. My opinion therefore is, that the Commissioner has put the right construction upon the words of the act, and that this petition must be dismissed.

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The case, however, stood over for final judgment.

ERSKINE, C. J.—In this case there had been a joint commission against the petitioner *Lomas*, and his partner *Cooke*, under which they were both declared bankrupts. The net produce of the joint estate amounted to 731*l.* 7*s.* 4*d.*, and the net produce of the separate estate of *Lomas* to 13*l.* 9*s.*; which latter sum (there being no debt proved against the separate estate of *Lomas*) had been carried over to the joint estate, making an aggregate of 744*l.* 16*s.* 4*d.*; and of which, dividends to the amount of 14*s.* 6*d.* in the pound had been paid to all the joint creditors, leaving in the hands of the assignees the sum of 215*l.*

June 12,

Upon the application of *Lomas*, a reference was made to the Commissioner to ascertain his statutable allowance under the commission; and the Commissioner thereupon certified, that it appearing to him that not more than one moiety of the joint estate could be deemed to have been the estate of the petitioner, within the meaning of the expression "*his estate*," contained in section 128 of 6 *Geo.* 4. c. 16., he had given the petitioner credit for 365*l.* 13*s.* 8*d.* as the net pro-

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duce of his share of the joint estate; and that it being admitted before him that the separate estate of the petitioner amounted to 13*l.* 9*s.*, and, there being no separate creditor of the petitioner, such sum was carried over to the credit of the joint estate, he, the Commissioner, had given the petitioner credit for the further sum of 13*l.* 9*s.*, as the net produce of the other part of his estate, and ascertained his statutable allowance to be the sum of 37*l.* 18*s.* 3*d.*, being 10 per cent. upon 379*l.* 2*s.* 8*d.*, the amount of the two sums of 365*l.* 13*s.* 8*d.* and 13*l.* 9*s.* The bankrupt *Lomas* objected to this mode of calculating his allowance, and insisted that, according to the statute, he was entitled to 10 per cent, upon the whole sum of 744*l.* 16*s.* 4*d.*, being the aggregate of the net produce of the joint estate and of his separate estate, and presented a petition to this Court, praying that he might be declared entitled to such allowance.

Upon the argument, great reliance was placed by the counsel for the petitioner on the decision of Lord *Lyndhurst* in *Ex parte Gibbs* (a), confirming the Vice-Chancellor's decision in *Ex parte Minchin*, and also upon the case of *Ex parte Morris* (b). I thought at the time that Mr. Commissioner *Fane*'s judgment was correct, and that the claim of the petitioner was not supported by the cases relied on. But as the point was new, and the decision on it would form a precedent in similar cases, and as my learned colleague, Sir *John Cross*, had not arrived at the same conclusion, it was thought desirable that the petition should stand over for the final judgment of the Court.

(a) Mont. 105.

(b) Mont. 505, and 1 Dea. & Ch. 526.

I have since carefully examined the cases cited, and all the other authorities bearing upon the point, and I still retain the opinion which I then expressed. And I am glad to have that opinion further confirmed, by the concurrence of Sir *John Cross*, in the view taken by the rest of the Court at the time of the argument.

If this question had arisen under the statute 5 *Geo.* 2. c. 30. s. 7., as qualified by the statute 3 *Geo.* 4. c. 81. s. 12., it might have been difficult to avoid the conclusion which the petitioner seeks to establish, owing to the peculiar wording of the first of those statutes. It having been decided in *Ex parte Bate* (a) and *Ex parte Powell* (b), that the allowance to bankrupts under a joint commission was joint and entire, and therefore that only one allowance was to be given amongst them, if all were entitled,—and that if all were not entitled, none could receive any portion of it,—it was felt to be a great grievance, that a bankrupt under a joint commission could never get the sum specified in the statute as the maximum of his allowance, however productive his estate might have been; and in many cases he was deprived of all allowance, by the misconduct of his partners after the dissolution of the bankruptcy. To remedy this grievance, the 12th section of the 3 *Geo.* 4. c. 81. was introduced, which gave an allowance to each bankrupt under a joint commission, when individually qualified to claim it, whether his partners were entitled to any or not; but it was still necessary to refer to the 5 *Geo.* 2. c. 30., to see what the allowance was to be; and there it would appear that each bankrupt was entitled to a per centage on the net produce of all the

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(a) 1 Bro. C. C. 453.

(b) 1 Mad. 70.

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estate that should be recovered in and received; which of course would include the whole of the joint estate: and under this clause the argument of this petitioner would have had the literal interpretation of the statute in his favour; although this conclusion, as I shall presently show, would be as unjust to the creditors as the former rule was injurious to the bankrupt.

But in framing the 128th and 129th sections of the 6 Geo. 4. the legislature has avoided this difficulty, and has adopted language which, in my opinion, has made the estate of each bankrupt the measure of his own allowance, and has enabled the Court to avoid the two extremes, either of giving too little to the bankrupt, or of taking too much from the creditors. By the 128th section it is enacted, "that every bankrupt who shall have obtained his certificate, if the net produce of his estate shall pay the creditors who have proved under the commission ten shillings in the pound, shall be allowed five per cent. out of such produce, to be paid him by the assignees, provided," &c. In looking at this section, we may collect the object of the legislature to have been, in substance, that each bankrupt should have returned to him, out of *his own estate*, an allowance bearing a stated proportion to the dividends received by the creditors, limiting the amount of such allowance to certain specified sums. In the case of a separate commission, to which alone the language of the 128th section is strictly applicable, no difficulty could arise; for the decision of *Ex parte Farlow* (a) having excluded the joint estate in such a case from the calculation altogether, the words "*his estate*" could only apply to the bankrupt's separate estate, and his

(a) 1 Rose, 421.

share of the surplus of the joint estate, if any; and if it had not been for the 129th section, the only way to apply the 128th section to the case of a joint commission, would be by treating the former as the bankrupt's, and adopting the decisions of *Ex parte Bate* and *Ex parte Powell* to the fullest extent: or if the 129th section had merely declared each bankrupt under a joint commission entitled to his allowance, although his partner may not be entitled to any allowance, it would be difficult to avoid the other extreme contended for by the petitioner. The difficulty arising in such cases from putting any other interpretation on the 128th section was pointed out by Sir *John Cross* during the argument; inasmuch as that section identifies the estate from which the dividends are paid with the estate upon which the allowance is to be calculated. But the 129th section, as it now stands, removes all difficulty; for by that section it is enacted, "that in all joint commissions" &c. "if a sufficient dividend shall have been paid on the joint estate and upon the separate estate of such partner, he shall be entitled to his allowance, although," &c. In the 128th section, the condition upon which any allowance is made payable to a bankrupt is, "if the net produce of *his estate* shall pay the creditors who have proved under the commission" the specified dividend; whereas, by the 129th, the condition upon which the allowance is payable under a joint commission is, if a sufficient dividend shall have been paid upon the joint estate and upon the separate estate of the partner applying. It therefore varies the condition upon which an allowance shall be payable, but makes no alteration as to the fund out of which it is to be paid or upon which the per centage is to be calculated. We

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must therefore look to the 129th section, to see if the bankrupt under a joint commission is entitled to his allowance, and we must then look to the 128th section to see how much is to be paid to him; and there we find that he is to receive a per centage upon the net produce of his estate, not exceeding a specified amount. Then, what is the estate of each bankrupt under a joint commission? Is it any thing more than his separate estate and his proportion of the joint estate of the firm? Taking therefore the two sections in connection with each other, I collect that it was the intention of the legislature to give to each bankrupt under a joint commission, when duly qualified, the full allowance of 5, 7½ or 10 per cent. up to the amount specified, upon the net produce of *his own estate*; and that it was never intended to give to several a similar per centage on the whole of the joint estate; and I find nothing in any of the cases to warrant the opposite conclusion.

In *Ex parte Minchin* and *Ex parte Gibbs*, it distinctly appears that if each bankrupt had received the full sum specified in the statute, the aggregate amount would not have exceeded the single per centage on the whole joint estate; and this fact is relied on by the counsel in *Ex parte Minchin*, and therefore in those cases no one of the bankrupts would receive more than the statutable per centage on his own share of the estate; in other words, a per centage on the net produce of his estate. And there is nothing in the case of *Ex parte Morris* (a) that at all interferes with the view I am now taking of the statute; for in that case the question was not what was to be the measure of the bankrupt's allowance, but whether he was entitled to

(a) 1 Dea. & Ch. 526; S. C. Mont. 505.

any, inasmuch as it appeared that the original joint estate was not sufficient to pay 10s. in the pound, and that the dividend to the joint creditors had been raised beyond that amount by the surplus of the separate estates of the two other bankrupts. But this Court decided, that, according to the language of the 129th section, it was not material from what fund the dividend upon the joint estate had been paid; but that if a sufficient dividend was paid upon the joint estates, and the separate estate of the partner applying, he was entitled to his allowance. The point now in dispute could not arise in that case; for it appears by the report in *1 Deacon and Chitty*, that the net produce of the joint estate was 45,620*l.* and of the petitioner's separate estate 928*l.* 12*s.* 9*d.*; adding, therefore, one-third of the joint estate to the separate estate, the petitioner's estate would be 16,000*l.* and upwards, the percentage on which would more than cover the 500*l.* claimed for his allowance. Neither the language of the statute therefore, nor any of the authorities are at variance with the opinion of the Commissioner; and I have the greater pleasure in confirming his decision, because it appears to me to be the only view which gives a just and reasonable effect to the obvious purpose of the legislature. To illustrate this, take the extreme case put by Lord Lyndhurst in *Ex parte Gibbs*, of forty members of a bankrupt firm equally interested in the joint stock, and all of whom were entitled to an allowance. I suppose the joint assets to be 36,000*l.*, and the joint debts 40,000*l.*, and that dividends to the amount of 10*s.* in the pound had been paid; there would then be 16,000*l.* left in the hands of the assignees, which would be just sufficient to pay each

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bankrupt the full statutable allowance of 400*l.*, to which each would be entitled, if the petitioner's claim be tenable. In that case the creditors would get 20,000*l.*, the bankrupts 16,000*l.*; the creditors would receive one-half of their debts, and the bankrupts would get back $\frac{1}{3}$ of their estate, instead of $\frac{1}{10}$. On the other hand, if only one allowance were to be made to all, the creditors would get 17*s.* 6*d.* in the pound, and each bankrupt only an allowance of 15*l.*, that is, $\frac{1}{8}$ th part, instead of $\frac{1}{10}$ th of his own estate. Whereas by the line adopted by the Commissioner in this case, each creditor would have 16*s.* in the pound, and each bankrupt would receive 90*l.*, that is, $\frac{1}{10}$ th of his own share of the estate, according to the obvious intention of the statute. But this case might be more strikingly illustrated by taking a case in which the dividends upon the joint estate had been principally paid by the surplus of the separate estates of some of the partners, while the separate estates of the others might, as in the case before us, be trifling in amount, though sufficient to entitle the bankrupt to an allowance. If each bankrupt were to be entitled to a per centage on the whole estate, out of which the dividends were paid—then those who had contributed little or nothing, would not only receive as much as those who had paid all, but would receive back, not a proportion of their own estate, but a portion of the separate estates of their partners, to which neither in law nor in conscience they ever had any claim. I entirely concur, therefore, in the view taken by Mr. Commissioner *Fane*, as equally consistent with the language of the statute, the intention of the legislature, the decisions on the subject, and sound practical good sense.

Sir J. CROSS.—The only question is, whether the petitioner's allowance ought to be computed upon the whole, or upon *his* share of the joint estate. The latter appears to me manifestly the more just and equitable mode of computation. This, however, is not a question of equity, but a pure question of law, depending on the construction of an act of parliament; and I did not at first see how that view of the case could be reconciled with the terms of the act. Upon further consideration, however, I think the law and the equity of the case are clearly reconcileable. The 128th section is adapted to cases of single bankruptcy, and the 129th to joint bankruptcies. The former gives in detail all the data for the calculation, both of the dividends and of the allowance dependent thereon, in single bankruptcies. The latter clause in more general terms enacts, that in all joint commissions before any one of several partners shall be entitled to an allowance, a *sufficient* dividend must be paid upon the joint estate, and also upon his separate estate; but without furnishing any data for calculation, or any words of reference to the preceding clause; yet it seems to me, that it must be understood to mean in the several proportions before mentioned. We find then that the dividend for this purpose is in express terms required to be computed on the joint estate, that is, upon the entire joint estate; but the allowance is tacitly left to be computed for each partner, according to the mode before prescribed in the case of a single bankruptcy, and that is on the net produce of his estate, which in the case of a joint commission consists of the whole of his separate estate, together with his share of the joint estate. This appears to me to

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be the true construction of the act, and I am therefore of opinion, that the allowance already made to the petitioner has been correctly calculated. I think the cases cited in argument do not touch this question, which does not seem to have been ever before brought under the consideration of the Court.

Sir G. ROSE having expressed his opinion at the hearing, declined saying any thing further upon it.

Bankrupt,
having obtained
his certificate,
is no longer
privileged as to
costs.

The petition was dismissed with costs against the bankrupt, he having obtained his certificate, and being therefore no longer privileged as to costs. The assignees were directed to be at liberty to retain their costs out of the amount of the allowance, paying over to the bankrupt the difference.

MEMORANDA.

November 3. Mr. *Thesiger*, Mr. *Hill*, (having patent of precedence,) Mr. *Erle*, and Mr. *Cresswell*, were this day called within the bar.

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Ex parte BIGNOLD.—In the matter of **POSTLE.**

Nov. 2.
April 25, 1835.

A Petition was presented in this case, praying the usual order for sale in cases of equitable mortgage, and for an order declaring the petitioner entitled to the rents and profits of the premises in mortgage, from the date of the fiat, which was issued on the 29th July 1834, on the petition of the petitioner. That petition stated that very valuable crops were growing on the mortgaged premises at the time of the bankruptcy, the cutting and gathering of which were committed to the superintendence of an agent, chosen by the solicitors to the fiat, and the petitioner, and who was subsequently adopted by the assignees, on their being chosen; but not otherwise stating the special circumstances hereafter detailed.

In general an equitable mortgagee is not entitled to the rents, &c. prior to the date of the order for sale.

But where, prior to the bankruptcy, the mortgagor absconds, and the equitable mortgagee of part of the property takes possession of that part by an agent, and a fiat issues against the mortgagor, and then the solicitor to the commission, on behalf of the creditors, and the equitable mortgagee, jointly, appoint the same agent to manage the whole property, which agent is subsequently adopted by the assignees:—Held, the mortgagee, though he was also petitioning creditor, was entitled to the rents &c. from the time of his first taking possession.

Mr. Anderdon, for the petitioner. We claim to be entitled to the produce of the estate from the date of the bankruptcy. The assignees thence become trustees, and take possession from that time in the character of, as it were, our agents. At law, it has long been determined that a landlord is entitled to receive emblements of the estate from the time of filing his declaration in the ejectment. And by analogy, we are entitled from the time of filing the petition. Thus, in the case of *Hodgson v. Gascoigne (a)*, growing crops of a tenant were seized under a *fi. fa.*, and then a writ of *hab. fac. poss.* was delivered to the sheriff, in an ejectment at the suit of the landlord, founded on a demise made long before the issuing the *fi. fa.*, it was held that the sheriff

(a) 5 B. & Ald. 88.

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fa., inasmuch as they could not, in point of law, be
Ex parte considered as belonging to the tenant, the latter being
Bienold. a trespasser from the day of the demise laid in the
declaration.

Mr. *Walker*, for the assignees. The principle in this case has been long ago determined upon. In *Ex parte Bignold* (a), the petition prayed the same relief as the present one; but in that case it was held, that the mortgagee was only entitled from the time of presenting his petition. This was a decision of Sir *John Leach*. But Lord *Eldon*, in the case of *Ex parte Alexander* (b), held, that he was only entitled from the date of the order for sale. In *Ex parte Bignold*, before this Court (c), Mr. *Montagu*, in support of the petition, which prayed the profits from the time of the bankruptcy, was so well satisfied of the law on this point, as it was decided in *Ex parte Alexander*, that he waived all claim to the profits prior to the date of the order. There is nothing in principle that should give the petitioner, being an equitable mortgagee out of possession, the profits, till such time as he has realized his security, and reduced his equitable right into legal and actual possession, by the order for sale. If a bill be filed by an equitable mortgagee, praying a receiver, the receiver will acquire no right to any of the rents and profits accrued prior to the date of the order appointing him; and this case is completely analogous. The petitioner is certainly not entitled, therefore, to any thing from the date of the bankruptcy.

(a) 2 Gl. & J. 273.

(b) Id. 275.

(c) 2 Dea. & Ch. 396.

Mr. *Anderdon*, in reply. At least the claim will hold good from the date of the order. But the order is founded on the petition, which is presumed to be heard at the first moment of its being presented, and it is only for the convenience of parties, and from pressure of business, that it is not in fact so heard, and the order made *eo instanti*. The order being subsequently made, however, ought to be considered as relating back to the time of presenting the petition; otherwise, and especially under the old system of the administration of the bankrupt laws, as the order might not have been made for months after the presenting the petition, the adventitious circumstance of the date of the order must be held to regulate so important a right, which would manifestly be an injustice.

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The COURT, however, thought that there was no circumstance to fix the presentation of the petition, as the date from which the profits were to be given to the equitable mortgagee; and observed that it would be quite as just to give them from the date of the act of bankruptcy, which would be contrary to all the cases on the subject. Equitable mortgagees have never been thus favoured. If any great delay between the presenting the petition and the date of the order had arisen, that might be a circumstance worthy of consideration. But that delay had not existed here; though if it were even the case of a legal mortgagee, filing a bill of foreclosure, the delay between the filing of the bill and the date of the order for a receiver, would not entitle him to the favour now sought. Still less should an equitable mortgagee be so entitled, especially in bankruptcy.

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The usual order for a sale was made, and the petitioner was declared entitled to the rents and profits from the date of the order.

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A second petition was now presented, which prayed that the above order might be varied, and the former petition reheard, upon the following grounds, which the petition stated; viz. that the sum of 5000*l.* advanced to the said bankrupt, and interest, exceeded the estimated value of the mortgaged estate. The mortgaged premises were, for some time before the bankruptcy, in the occupation of the bankrupt, with other premises held under different titles; and he carried on an extensive farming concern on the premises, under one combined and general management. Shortly before the issuing of the fiat, the bankrupt absconded from his residence at Worstead, (the premises in question) and vacated the possession thereof, and of the lands &c. which constituted his farm; whereupon the petitioner immediately took measures for obtaining the possession of the premises, and did, in fact, on the 29th day of July 1834, take possession of the premises by Mr. *William Butcher*, a land agent at Norwich, as his agent, in concert with Messrs. *Sewell & Co.* the solicitors for the general creditors, and who were desirous that *Butcher* should be employed as agent in the carrying on of the farm, for the benefit of the several parties interested. After the choice of assignees, the selection of *Butcher* as such agent being approved by them, he, under the direction of the petitioner, and of Messrs. *Sewell & Co.*, took the necessary steps for harvesting the crops which were growing on the farms; and, in so doing, employed indiscriminately

the same labourers, and used the waggons and horses, and other farming stock and utensils, of the bankrupt; it being arranged that, as between the several parties interested, *Butcher* should ultimately state a proper account, in which the produce of that portion of the farm in which the petitioner was interested should be charged with a fair proportion of the expense of harvesting, including therein the use of the farming stock and utensils of the bankrupt.

In the interval between the issuing of the fiat and the choice of assignees, the crops which were growing upon the mortgaged premises, at the time the petitioner so took possession, were accordingly cut and harvested by and under the superintendence and management of *Butcher*; and the same were kept distinct from the crops and produce of the other parts of the farm. *Butcher* having, under the arrangement and understanding, sold part of the crops and produce, on the 8th day of November, paid over to the petitioner, with the privity and entire concurrence of Messrs. *Sewell & Co.*, the sum of 53*l.*, being part of the money produced by such sale, and the residus of the produce was still in the hands of *Butcher*.

The petition proceeded to state, that the petitioner caused the first-mentioned petition to be prepared; and, relying on the arrangement and understanding, and no doubt being entertained as to the course the matter would take, the special circumstances hereinbefore set forth were not stated in that petition: and the solicitors of the petitioners, fully conceiving that the petition would be heard merely in the nature of a petition that would be consented to, as to the whole of the relief thereby prayed, and having been given to

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understand that not only would no opposition be made thereto by counsel on the part of the assignees, but that the assignees, or their solicitors acting on their behalf, would instruct their counsel to appear on the hearing, and consent to an order being pronounced as prayed, in consequence thereof instructed counsel to mention the petition to the Court, so as to obtain an order thereupon, as by consent: and accordingly, on the 3d day of November last, being the day before the day of hearing, the counsel for the petitioner, at the sitting of the Court, brought on the said petition to be heard, in the absence, nevertheless, of the solicitors of the petitioner; when the counsel who appeared for the assignees, instead of consenting to the petition, by mistake opposed it, so far as the same extended to the growing crops being applied to the satisfaction of the petitioner's debt; and some discussion and argument thereupon took place before the Court, as to the question with respect to the rights of equitable mortgagees generally in the abstract, though the same was not fully argued: whereupon the above order was made. The petition then alleged that the attention of the Court was not directed to the special circumstances, even so far as the same were set forth in the petition; and the same were not urged or argued by the petitioner's counsel as constituting a peculiar ground of relief, independently of, and collaterally to the question of law: and that of necessity the special circumstances hereinbefore set forth were not in any manner brought under the consideration of the Court.

Mr. Swanston and *Mr. Anderdon* now appeared to support the petitioner's claim to the rents and profits

from the time when *Butcher* entered into possession, which he did as the agent of both parties, viz. the petitioner and the general body of creditors. The mortgagor having abandoned the premises, the petitioner, under his title of equitable mortgagee, had immediately a legal right to enter; a mortgagor being at law (and by analogy the same in equity) a mere tenant at sufferance, and one who may be treated either as tenant or trespasser, at the election of the mortgagee; *Partridge v. Beare* (a), and *Doe d. Roby v. Maisey* (b). Had the mortgagor been in actual possession, and had the mortgagee (being a legal mortgagee) exercised his right to possession by making actual entry on the land, he would have been no trespasser, *Johnson v. Howson* (c); à fortiori, has he à right of entry where, as in this case, possession is vacated by his mortgagor.

That an equitable mortgagee is entitled, as against the assignees of a bankrupt, to all such benefits from his mortgaged property as he would have been entitled to against his mortgagor, is a proposition which we conceive is fully established by the case of *Pope v. Biggs* (d), and *Sumter v. Cooper* (e), but more particularly by the latter case. Such being the principles which govern Courts of Law, and it being entirely by analogy to legal principle that equity was first induced to recognize a mortgagee's title to crops, we contend that the true test of an equitable mortgagee's title to crops in bankruptcy is this, namely, whether he has done any act which in equity can be regarded as tanta-

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(a) 5 Barn. & Ald. 604.

(b) 8 Barn. & Cr. 767; S. C. 3 Man. & Ryl. 107.

(c) 2 Man. & Ryl. 226.

(d) 4 Man. & Ryl. 193.

(e) 2 Barn. & Adol. 223.

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mount to an assertion of title,—such as, if done in a Court of Law, (the mortgagor being solvent) would give him, in the result, a title as against the mortgagor. Now we have, by the cases cited, clearly shown, that at law, had the present mortgagee been a legal mortgagee, he might have put an end to the permissive possession of his mortgagor at any time, and treated him as a trespasser; and the necessary inference from his having such power would have been, even if the case of *Johnson* and *Howson* had not been decided, that finding the possession of his land vacant, he would be at liberty to resume possession of it, and take possession of every thing in and upon it. We therefore claim the right to the crops and profits from the time Mr. *Butcher* took possession.

Mr. *Walker*, *contra*. The mere taking of possession by an equitable mortgagee, in the manner here described, cannot give him any title as against the assignees. In order to do so, it is necessary, in bankruptcy, that there should be a judicial declaration that he is an equitable mortgagee. Prior to such declaration, the petitioner in this case was a mere trespasser, and could not have acquired any right to the bye-gone rents. The relief given to a mortgagee, in such a state of circumstances as the present petition discloses, (putting bankruptcy out of the case,) could only be by filing a bill for a sale, and praying a receiver; and the intervention of bankruptcy cannot give him a greater and more immediate right, than he would otherwise have had. The circumstance of the actual entry will therefore go for nothing upon the present application; and, independent of the foregoing reasons, the petitioner,

being the petitioning creditor under this fiat, must be presumed to have taken possession under it for the benefit of the creditors, and not adversely to it, for his own benefit alone.

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Mr. *Swanston*, in reply, was stopped by the Court.

ERSKINE, C. J.—The Court is of opinion, that the petitioner is entitled to the crops, from the time of Mr. *Butcher*'s taking the possession of the premises in question. Upon the deposit of the deeds, he became entitled to the same beneficial interest in equity, as though he had been a legal mortgagee. If he had never *de facto* taken possession, but had come here simply for a sale,—or, in the case of a bill filed, if he had not possession, and had applied for a receiver and for a sale,—the assignees would have been entitled to the crops till the date of the order; because, as their intermediate possession would have been the virtual possession of the mortgagor, the rule that the mortgagee, till he had realized his security by reduction into possession, can have no right to an account of past profits (*a*), would apply. But it appears, that on the 29th July the petitioner took possession by his agent, Mr. *Butcher*; and from the statements contained in the petition, which are uncontradicted, he took possession of the particular part of the farm over which his mortgage extended, not as for the benefit of the creditors at large, but as for his own sole beneficial interest, quite distinct from his character as petitioning creditor: and it appears, that the solicitors took possession of the other parts of the

(*a*) *Ex parte Wilson*, 2 Ves. & B. 252; *S. C.* 1 Rose, 444; *Coleman v. St. Alban's*, 3 Ves. 25; *Higgins v. York Buildings Company*, 2 Atk. 107.

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farm for the benefit of such other creditors. By the arrangement which was subsequently adopted by the assignees, it also appears, that distinct accounts were to be kept of the produce of the petitioner's part of the farm, and an allowance thereout was made to the assignees for the use of the farming utensils employed in harvesting the part mortgaged to the petitioner; clearly showing an assent, on the part of the assignees, to the petitioning creditor's distinct and separate right. The possession of the title-deeds, and his interest in the premises, gave the petitioner an implied authority, from the bankrupt and from the assignees, to take and retain possession; and there has been nothing done, whereby that authority was revoked. And in *Garry v. Shar-ratt* (a), Lord Tenterden says, "By the assignment of the estate of the insolvent to the plaintiff, all that *Flowers* (the insolvent) was entitled to at law and in equity passed to the assignee. At law, *Flowers* was entitled to the land; in equity, the defendant, as mortgagee, was entitled to the land and the rents accruing from it. The assignment to the plaintiff did not give him any right to those rents:" and the verdict, which was given for the mortgagee, was confirmed by the Court. There, too, it was a question left to the jury, to ascertain whether there was an implied authority to take the rents. But in the case before us, there has been actual possession of the property, together with possession of the title-deeds,—a possession vacated by the bankrupt, and thence an implied authority to the petitioner to enter, and an actual entry in consequence. I therefore think the petitioner is entitled to the profits from the time of Mr. *Butcher's* possession, and that the

(a) 10 Barn. & Cres. 718.

assignees have no right to them, except to have the account taken of them in diminution, *pro tanto*, of the mortgage debt.

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Sir JOHN CROSS.—It is not to be disputed, that an equitable mortgagee, lawfully in possession, is entitled to take all the rents and profits of the estate, in diminution of his mortgage debt: and the question is, if the petitioner has been lawfully in possession. Here the bankrupt had deserted the premises; whereupon the petitioner took possession by his agent. Even assuming his act to have amounted to a trespass, the assignees subsequently treated it in such a manner, as clearly to have adopted it in every way, and thereby to have turned it into a lawful possession.

Sir GEORGE ROSE.—The petitioner being entitled to possession, the fact of his being the petitioning creditor can be no answer to his rights as equitable mortgagee. I should be sorry to go the length of laying it down, that the mere deposit of the title-deeds would, *ipso facto*, imply any authority to the equitable mortgagee to receive the rents and profits of the estate. I do not think the case of *Garry and Sharratt* (a) would bear out any such proposition. In that case the title-deeds of the estate in question were deposited with the mortgagee; and the learned judge left it to the jury to find, whether there was an implied authority to receive the rents. This they accordingly found, from other facts connected with the deposit; otherwise, that decision could not have been upheld. In the case before the Court, I should say, that the deposit

(a) 10 Barn. & Cres. 716.

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did not give any right of possession, or show any intention that the petitioner should receive the rents of the property. Indeed, I should say, the facts disclosed before us would be sufficient to displace any such intention. It is, however, clear that on the mortgagor absconding, (without the intervention of bankruptcy) the Court of Chancery, on the representation of the scantiness of the security, would immediately have granted a receiver, upon bill filed, and on motion. The petitioner, however, took possession, and put his agent into the premises; and although that would not be sufficient and good against the assignees, standing alone and denuded of the circumstances that followed, or amount in effect to the appointment of a receiver under the order of a Court of Equity,—yet where we find the assignees, being fully competent to assent, acting in the manner they have done, and that they have actually assented to that which a Court of Equity would have done,—we cannot say that the petitioner's right, thus acquired, can now be taken from him. He is therefore entitled to the prayer of his petition.

The petitioner was declared entitled to the produce of the mortgaged premises, in the hands of Mr. *Butcher*, since the time of his taking possession; the assignees to have their costs out of the fund.



1834.

Ex parte HOLFORD and another.—In the matter of

TATE.

*Westminster,
November 25.*

THIS was a petition of two assignees, praying that the third assignee and his private solicitor might be ordered to deliver up the proceedings to a solicitor appointed by the petitioners.

The majority of the assignees have a clear right to the custody of the proceedings.

Mr. Twiss, who appeared in support of the petition, after stating the object of it, was stopped by the Court.

Mr. Swanston, and **Mr. Koe**, *contrà*. The proceedings were duly handed over to **Mr. Clayton**, the third assignee, to investigate the accounts and institute certain inquiries beneficial to the bankrupt's estate; and he employed his own solicitor for that purpose. It is no where suggested in the petition, that either this solicitor, or **Mr. Clayton**, was unfit to retain the custody of the proceedings; or that the purpose was accomplished, for which the proceedings were put by the two other assignees into **Clayton's** possession. **Clayton** is a large creditor of the bankrupt's; while one of the petitioners, **Holford**, is no creditor, but merely a clerk to a creditor; and the other petitioner is only a creditor for 100*l.*, and his son is a considerable debtor to the bankrupt's estate. It is not meant to be contended, that **Clayton** is to overrule the majority of the assignees; but as there is in this case a good reason for the proceedings remaining where they are, and no inconvenience has been shown from their present custody, the Court may not deem it expedient to remove them from the possession of **Clayton**, until the purpose is accomplished for

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Ex parte
HOLFORD
and another.

which they were handed over to him. The solicitor chosen by the two other assignees was appointed by them, without the knowledge of *Clayton*, or his being in any way consulted on the subject. But before a fresh solicitor is appointed, there ought to be a meeting of the assignees, to consider the propriety of such appointment. There is no complaint, that *Clayton* has refused either of the petitioners access to the proceedings; and as the Court has a discretionary power to say in whose possession the proceedings ought to be kept, it will not, under these circumstances, remove them from the control of that assignee, whose retention of them is for the benefit of the bankrupt's general creditors.

Mr. *Twiss*, in reply, was stopped by the Court.

ERSKINE, C. J.—It has not been pretended; in this case, that the majority of the assignees have not a right to exercise a control over the custody of the proceedings; but it is said, that the circumstances of the present case justify the retention of them by the solicitor of the third assignee. There may be, certainly, a state of circumstances, which would induce the Court to order the proceedings to be kept by a particular assignee. But it would not be consistent with justice, that the majority of the assignees should be deprived of the custody of the proceedings, when there is no charge whatever against them for misconduct: and it would be only on a charge of that description, contained in a cross-petition for the removal of these two assignees, or to prevent them from acting as assignees, that the Court could, with any reason, refuse to grant the prayer of the present petition.

Sir J. Cross.—The special circumstances, which have been here so much relied on by the counsel for the respondents, are simply these. The three assignees meet at the office of one of the respondents, who is the private solicitor of one of the assignees; and this third assignee then proposes to the other two, that the proceedings should be delivered up to him for a particular purpose. He then hands them over to his own solicitor, and refuses now to give them up, because, he says, the purpose is not answered. There is no pretence whatever for withholding the proceedings.

1884.

Ex parte
HOLBORN
and another.

Sir G. ROSE concurred.

ORDERED as prayed, with costs.

*



Ex parte CASS.—In the matter of RIVERS.

Westminster,
January 16,
1836.

THIS was the petition of an assignee, to tax a solicitor's bill for business done previous to the choice of assignees. It appeared, that the solicitor to the petitioning creditor, not being admitted an attorney of this Court, employed another attorney, as his agent, to issue the fiat and conduct the proceedings up to the choice of assignees, and that two different bills had been delivered by these two solicitors.

Where an assignee applies to have a solicitor's bill taxed, for business done before the choice of assignees, which is not included in the bill taxed by the Commissioners, the petition should state the nature of the business, and when it was done, and the proceedings should also be in Court.

Mr. J. Russell appeared in support of the petition.

Mr. Bethell, for the respondent, objected, that the bill sought to be taxed by the petitioner was the peti-

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—
Ex parte
Cass.

tioning creditor's bill up to the choice of assignees, which having already been taxed by the Commissioners, and paid by the assignees, the petitioner was bound to point out the objectionable charges.

Mr. *Russell*. The assignee has had two bills delivered to him in this case; and we do not come here for an order to tax the bill already taxed by the Commissioners, but another bill, viz. that of the attorney who acted as agent for the solicitor to the petitioning creditor. [Sir *G. Rose*. If the petition is to tax a bill for business done before the bankruptcy, the Court has no jurisdiction to order it to be taxed, unless the business done by the attorney was mixed up with the proceedings under the bankruptcy. But it is an idle waste of time to go on with this discussion, unless the proceedings under the commission are produced, in order that we may see whether the bill in question has been taxed or not.]

ERSKINE, C. J.—The petitioner states, that he employed these solicitors to sue out the fiat, and that they delivered in their bill for charges and disbursements relating to the prosecution and working of the commission, down to the choice of assignees. Now, we cannot say, whether the bill included these charges or not, unless we see whether it is on the proceedings.

Sir J. Cross.—The petition does not state, to my mind, what are the real facts of the case. The petitioner must therefore either begin *de novo*, or crave for leave to amend.

Sir G. ROSE.—Whoever reads this petition will see that it merely states an ordinary case, to tax a bill up to the choice of assignees; while the affidavit of the petitioner in support of his petition states, that there is another bill, quite distinct from the bill of the solicitor up to the choice of assignees, and including charges for business done preliminary to the fiat.

1835.

Ex parte
CASS.

ORDERED, that the petitioner might have leave to amend, on paying the costs of the day.

Ex parte SOPER.—In the matter of **SALTER**
and **PEARSON**.

Westminster,
January 28.

MR. SWANSTON moved to amend the minutes of an order, that was made in this matter on the 10th December last (a). The object of the petitioner was, that a joint and several creditor, who had proved his debt under both estates, might be compelled to elect, and refund the dividends which he had received on one of the estates. The minutes of the order pronounced on the hearing of the petition were, that the creditor should elect on which estate he would prove, and that after his election to prove on one estate, his proof should be expunged on the other; and that any future dividends of the estate, on which the proof should be expunged, should be paid over to the other estate, until it was recouped. It turned out, however, that there was no fund for this purpose; for all the concerns of the estate, on which the proof was ordered to be ex-

Where a party wishes an essential alteration to be made in the judgment of the Court, as pronounced on a former hearing, he must not apply to amend the minutes of the order, but must petition for a rehearing.

(a) 2 Mont. & A. 55.

1835.

Ex parte
Soren.

punged, having been wound up, there was no fund out of which the estate, on which the creditor had elected to retain his proof, could be indemnified; as there could be of course no future dividends declared of the estate from which the proof was expunged. The present application was, therefore, that the minutes of the order might be altered, so as to compel the creditor to refund the dividends already received by him from the estate, on which he had abandoned his proof.

Mr. *Pigott*, who appeared for the creditor, the respondent in the former petition, contended that this application was irregular, and ought to be refused with costs.

ERSKINE, C. J.—Where there has been any mistake committed by the Court in pronouncing its order, or by the officer in drawing it up, there, no doubt, the proper course to be pursued is to make an application to the Court to amend the minutes of the order. But this application is not to correct any mistake of the Court, or the officer, but for an essential alteration in the judgment of the Court; which can only be applied for, on a petition for rehearing.

The rest of the Court concurring, the motion was

Refused with costs.

1885.

In the matter of JACOB.

Westminster,
January 28.

IN this case a fiat was issued against the bankrupt on the 6th January, directed to country commissioners. The time had not yet expired for opening it; but considerable delay had elapsed, in consequence of the petitioning creditor being unable to establish an act of bankruptcy. He had now, however, discovered that he could prove the act of bankruptcy; but was doubtful, whether he could be prepared with the evidence for that purpose, within the short interval now remaining for opening the fiat.

The Court will not, on the application of the petitioning creditor, alter the date of the fiat to a later day, to give him more time to prove the act of bankruptcy.

Mr. *Anderdon*, under these circumstances, applied on behalf of the petitioning creditor to amend the fiat, by altering the date to a later day, in order that the petitioning creditor might have more time allowed him for opening the fiat; and he cited the case of *Re Roberts (a)*, in support of the application. The object was to save the expense of issuing a new fiat, which would amount to 10*l*.

ERSKINE, C. J.—Where a petitioning creditor takes out a fiat, without being prepared with sufficient evidence to support it, the Court is not inclined to render him any assistance; and they have acted upon this principle in the recent case of *Ex parte Howes (b)*.

Mr. *Anderdon*. In that case, the application was made by a different creditor from the one who had

(a) 3 Dea. & Ch. 315.

(b) 3 Dea. & Ch. 498.

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In re JACOB.

issued the fiat. Here it is made by the same creditor. At all events, if the Court will not permit the amendment, they will allow the petitioning creditor to issue a new fiat.

ERSKINE, C. J.—When the time for opening the present fiat expires, you can then come with your application for a second fiat.

Sir J. CROSS.—Every case of this kind depends on its own peculiar circumstances. This is a different case from that of *Re Roberts (a)*; and the circumstances here do not, I think, justify the application.

Motion refused.

(a) *Suprà*. In that case, too, the Court were not unanimous in granting that application.

Westminster,
January 29.

Ex parte REYNOLDS.—In the matter of MOORE.

A letter written some months after the deposit of deeds, acknowledging the purpose for which they were deposited, is a sufficient memorandum in writing, to entitle an equitable mortgagee to his costs out of the produce of the sale.

THIS was the petition of an equitable mortgagee, praying for the usual order of sale; and the only question was, whether there was a sufficient memorandum of deposit, to entitle the petitioner to his costs out of the proceeds of the sale. There was no memorandum accompanying the deposit of the deed; but, some months afterwards, the bankrupt wrote a letter to the petitioner on the subject of the advance made at the time of the deposit, and requesting a further loan; in which letter he thus expressed himself:—"As you

hold the lease of this house, which I think quite sufficient security, and which was deposited in January last;”—pressing the petitioner, on that ground, to make him further advances.

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Ex parte
REYNOLDS.

Mr. *Flather*, in support of the petition, cited *Ex parte Reid* (a).

Mr. *Bichner*, *contra*, submitted that this letter, being written so long after the actual deposit, was not an agreement in writing, within the meaning of the general rule; and that the petitioner, therefore, was not entitled to be allowed the costs of the sale.

The COURT, however, thought that the letter amounted to a sufficient memorandum, and was one to which the assignees might refer for information, as to the terms of the deposit.

Usual order.

(a) 1 Dea. & Ch. 250.

Ex parte WILLIAM WHITE.—In the matter of DANIEL
BRITTEN.

Westminster,
January 30.

THIS was the petition of one of the assignees, who was also the petitioning creditor who sued out the commission, praying, that the bankrupt might be restrained from further proceedings at law to dispute

After repeated acts of acquiescence of the bankrupt in the validity of a commission, and the dismissal of a

former petition by him to the Lord Chancellor to supersede it, the Court will restrain him from bringing actions against his assignees.

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Ex parte
WHITE.

the validity of his commission. The petition stated the following facts.

The bankrupt had been a packer and calenderer, carrying on business in Tenter Street London, previous to the 21st December 1824, when a former commission was issued against him on the petition of his father, who proved a debt for 18,000*l.*; and shortly afterwards the bankrupt obtained his certificate; but no dividend had ever been paid under that commission. His father afterwards executed a deed of gift to him of certain property in Tenter Street and at Walthamstow; and the bankrupt then removed to Bashley Lodge, near Milton, in Hampshire, where he kept up an expensive domestic establishment. In November 1827, his effects being distrained upon for rent, he applied to the petitioner, who carried on the business of a carpenter and builder at Milton, to become one of the parties to a replevin bond; which request the petitioner complied with. In the course of the following year the bankrupt quitted his residence at Bashley Lodge, being greatly in debt; and the petitioner was obliged to pay 112*l.* 10*s.*, as one of his sureties in the replevin bond; which, added to a sum due to the petitioner for carpenter's work, made the petitioner's debt amount to 149*l.* 12*s.* 5*d.* The bankrupt then sojourned in London some time, under the assumed name of *Grange*, and finally went to Brussels. The petitioner, not being able to obtain from the bankrupt the payment of his debt, on the 17th February 1831 sued out a commission against him, under which the petitioner was chosen one of the assignees. On the 12th March 1833 the bankrupt surrendered to his commission, and requested some allowance for his maintenance; when the Commis-

sioners, with the consent of the assignees, ordered 60*l.* to be paid to him for that purpose. The examination of the bankrupt's accounts occupied the space of eleven weeks; during which period the bankrupt from time to time attended the examination, and called frequently on the solicitor to the assignees to give him information as to the effects to be received,—particularly, as to a sum of 3000*l.* owing from a Mr. *Bailey*, who, he requested, might be summoned before the Commissioners. On the 11th April 1831 the bankrupt brought a letter to the petitioner from Mr. *Dampier*, the petitioner's solicitor, requesting the petitioner to sign the bankrupt's certificate, and that he would use his influence in getting his neighbours to do the same. On the 12th April 1833 the bankrupt passed his last examination, and, in the list of debts then given in by him, stated the petitioner to be a creditor for 149*l.* 12*s.* 5*d.* The only property which the bankrupt disclosed on his last examination, was an interest in certain leasehold premises in Tenter Street, and some freehold property in Basinghall Street, and also an interest in the partnership firm of *Perrott and Watts*; but the petitioner alleged, that he was also possessed of a valuable library of books, a gold watch, and a quantity of silver plate and jewels of large value, which he did not disclose, but pledged the plate and jewels at Brussels. From the time of issuing the commission up to the time of passing his last examination, the bankrupt had on various occasions been engaged in assisting his assignees to oppose proofs; and upon his evidence, the proof of a debt claimed by a Mr. *Curtis* was rejected by the Commissioners; and upon a petition by *Curtis* against their decision, the bankrupt made an

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affidavit in opposition thereto. On the 18th June 1831, a dividend was declared of 2s. in the pound; and on the 18th July 1831 a petition was presented by *Pullen & Son*, who were the bankrupt's solicitors, to supersede the commission, although they had proved under the commission and signed the bankrupt's certificate. On the 11th August 1831, a petition was also presented by the bankrupt to supersede the commission, on the ground that the commission was fraudulent, that the bankrupt was not truly described in it, and that there was no debt due to the petitioner. These petitions came on to be heard before the Vice-Chancellor on the 26th November 1831, and were both dismissed with costs; the costs of the petitioner and his co-assignees, on the petition of the bankrupt, having been afterwards taxed at the sum of 81*l.* 14*s.* There was then an appeal in each case to the Lord Chancellor, and both the petitions of appeal were likewise dismissed with costs; but the costs had never been paid. On the 4th September a meeting was held to declare a further dividend; when *Jane Britten*, the bankrupt's wife, as executrix *de bonis non* of the bankrupt's father, claimed to be admitted to prove a debt of 8000*l.*, on a bond given by him on the 3d July 1813 to his father, and afterwards served a notice on the assignees to prevent the fund from being divided; but the proof was finally rejected, and she made no further claim to prove. But on the 17th September 1831 she demanded of *Perrott and Watts* the sum of 254*l.* 11*s.* 4*d.* for rent for the premises in Tenter Street, and afterwards arrested them for that amount, but never proceeded in the action. The petition then alleged, that the debt of 8000*l.*, attempted to be proved by the bank-

rupt's wife, was part of the debt of 18,000*l.* proved by the bankrupt's father under the first commission; and that the bankrupt had, in his own hand-writing, made subsequently an indorsement on the bond, for the purpose of renewing his liability on it, but had never mentioned the debt in his last examination; and that the bankrupt himself was the real party attempting to prove this debt. The petition then stated, that the assignees had redeemed the plate and jewels pledged by the bankrupt at Brussels, which they sold for 109*l.* 19*s.* 6*d.*; and that they afterwards indicted the bankrupt for embezzlement, but that he was acquitted, on the ground of a technical defect in the evidence. In Trinity term 1833 the bankrupt, suing *in formâ pauperis*, brought an action of trover in the Court of Exchequer against the assignees and the solicitor to the commission, for the value of certain books and effects which he had brought over from Holland; which was tried on the 5th July 1834, when the bankrupt was nonsuited. The object of the bankrupt in bringing this action, it was alleged, was to put in issue the validity of the commission; and the assignees were by this proceeding put to an expense of nearly 800*l.* Eleven days afterwards, however, the bankrupt commenced another action of trover against his assignees in the Court of Common Pleas, for recovery of the books and effects, the gold watch, and the plate and jewels which the assignees had sold as before-mentioned; when *J. T. Barham*, one of the assignees, gave the petitioner notice that he should require him to defend such action, and to save *Barham* harmless from the costs. After this, the bankrupt brought a third action against *Barham* in the Court of Exchequer, to

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recover the value of the gold watch, plate and jewels. The petition then stated, that the attorney employed by *Barham* to defend such action was Mr. *Pullen*, the solicitor and confidential friend of the bankrupt; that these three persons were in frequent communication with each other; that this last action was set down for trial at Guildhall; that the bankrupt had declared to several persons, that he never should have brought these actions, but on account of the prosecution which had been instituted against him for embezzlement; and that he had on such occasions expressed himself to the effect, that he might be better, but could not be worse off.

The bankrupt had not obtained his certificate.

The petition prayed, that the bankrupt might be restrained by injunction from all further proceedings in the last action, and be also perpetually restrained from all other proceedings to impeach or supersede the commission; or that he might, at least, be restrained from proceeding, until he had paid to the petitioner the costs of the two former petitions, as well as the costs of the application.

Mr. *Swanston*, and Mr. *Montagu*, in support of the petition. There is no doubt in this case of the trading of the bankrupt; for he continued in a trading partnership with two other persons at the time the petitioning creditor's debt was contracted, and the debt itself is clearly established by the different affidavits. There is, also, as little doubt of the commission of an act of bankruptcy. The object of the petitioner is, to be relieved from a course of vexatious litigation, on a question which admits of no reasonable doubt, and which

has been already repeatedly determined. There has been, moreover, a passive acquiescence, as well as an active co-operation, of the bankrupt in various proceedings under this commission. The sum of 60*l.* was paid to him by the assignees on his own application, to assist him during the progress of the commission. Eleven weeks were occupied in examining the accounts between the bankrupt and his partners, at which examination the bankrupt continually attended;—at the different meetings of the commissioners, he watched the proof of debts;—he afterwards passed his last examination, and applied for his certificate;—and in his balance sheet he specifies the debt of the petitioning creditor. One of the creditors petitions to prove a debt; the bankrupt makes an affidavit in opposition to that petition; but there is no denial in his affidavit to the statement in the petition, that the commission was duly issued against him.

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Sir G. ROSE.—In order to ground your application for this injunction, your case must be, that the bankrupt has a good cause of action; for if he has no cause of action, there is no need for this application.

Mr. *Twiss*, for the bankrupt, rested his defence to the petition on three grounds. 1. That the Court of Exchequer had already decided the point in favour of the bankrupt. 2. That if the statement of the petitioner was true, there was a good defence to the action now pending, and therefore there was no necessity for any application to this Court. 3. That the commission was an abuse of the Great Seal, and was taken out merely for the purpose of dissolving a partnership.

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With respect to the *first* proposition; the petitioner applied to the Court of Exchequer to dispauper the bankrupt in the first action brought by him *in formá pauperis*, and also to stay proceedings in the *second* action; on both which occasions the same facts were relied on as are stated in this petition; but the Court refused each application. The matter is therefore *res judicata*. The whole merits of the case were decided by that Court, which had a competent jurisdiction to adjudicate upon them; and now the petitioner comes here to have the same question decided, although there is new matter in the case, and the circumstances are precisely the same. [Sir J. Cross. The Court of Exchequer, as a Court of Law, cannot stay an action at law on equitable grounds, but this Court may do so, although the Court of Exchequer could not.] [*Erskine*, C. J. As it appears that *Barham* withdrew the application in the first action against him, does not the argument fail you, that in the action against *Barham* the Court of Exchequer have decided the question?]

2dly. If the statements in the affidavits in support of the petition are true, the petitioner has a good defence at law; but he has never ventured to go into the merits at law. The nonsuit against the bankrupt in an action of trover, was not on the merits, but on a point of law arising as to the conversion; he could not, in fact, prove the authority given by the assignees to seize the goods, and therefore the bankrupt was nonsuited. There never was, substantially, even one action tried; for the first was decided on a point of law, the second was discontinued and the costs were paid, and the third action they are now endeavouring to stop. In *Ex parte Bry-*

ant (a), where there was as much litigation as in the present case, Lord *Eldon* said, " This Court will undoubtedly injoin a bankrupt from vexatiously and repeatedly bringing actions against his assignees; but I do not believe, that it has ever considered his failure in the first action, as a reason for interposing against a second."

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3dly. The commission in the present instance, was taken out for the sole purpose of dissolving a partnership. The bankrupt swears, that he was a partner in the firm of *Perrott* and *Watts*, who endeavoured to dissolve the partnership as to the bankrupt, but that not being able to do so, they bought the debt of *White*, the petitioning creditor, and employed *White's* attorney to issue the commission; and that *White* gave them a bond, that he would act implicitly under their directions. So that the petitioner does not come here with clean hands; as this is not his petition, but that of *Perrott* and *Watts*. The bankrupt also swears that his assets were 3500*l.*, while his debts amounted only to 2600*l.* The commission in this case was taken out for an indirect and improper object, namely, to dissolve the partnership subsisting between the bankrupt and *Perrott* and *Watts*; and where there has been such an abuse of the process of the Court, the commission will be superseded; *Ex parte Browne* (b). And the same doctrine was holden in *Ex parte Gallimore* (c), where a commission was taken out to determine a lease. [*Erskine*, C. J. But Lord *Eldon* has said, that if a commission is taken out for the purpose of working it as a commission, although the petitioning creditor might also have another object in view, yet that a com-

(a) 2 Rose, 4.

(b) 1 Rose, 151.

(c) 2 Rose, 424.

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mission under these circumstances might be permitted to stand (a).] In the present case the bankrupt swears, that *Perrott* and *Watts* have, besides purchasing *White's* debt, on which this commission was issued, paid him also the sum of 770*l.* for costs and his own expenses. So that it plainly appears, that though *White* was ostensibly the petitioning creditor, he was a mere instrument in the hands of *Perrott* and *Watts*. With respect to the dismissal of the petition of appeal of the bankrupt to the Lord Chancellor for a supersedeas, he swears distinctly, that it was dismissed on a mere formal objection, founded on a defect in the affidavit of service.

Mr. *Swanston* was not called upon to reply.

ERSKINE, C. J.—All that could possibly be urged for the bankrupt has been urged by the counsel in support of this petition; but the Court is, notwithstanding, of opinion that it ought to grant an injunction, on the ground that the bankrupt is now proceeding to dispute a commission, after repeated acts of acquiescence, and also after a decision in favour of its validity by the Lord Chancellor. That the bankrupt has a good defence to a commission in a Court of Law, is not a reason that will always apply for the refusal of an injunction to stay proceedings in an action, under circumstances similar to those of the present case. For when the Court sees, that the bankrupt has no funds to answer the costs already incurred by him, in instituting various legal proceedings against his assignees, and puts the estate to a ruinous expense, by a long course of continued

(a) See *Ex parte Bourne*, 2 G. & J. 148, 161.

litigation, it is the duty of the Court to interfere, and stop such a wanton waste of those funds which ought to be divided amongst his creditors. It clearly appears, from inspecting the proceedings, that the bankrupt acquiesced in this commission; he never on any occasion objected that the petitioning creditor had no such debt, which he now disputes,—he applied to his assignees for an allowance under his commission, and gets 60*l.*—he brings a letter to *White*, the petitioning creditor, from Mr. *Dampier*, *White's* solicitor, requesting *White* to use his influence to procure the bankrupt his certificate; and it is not pretended, that he was ignorant of the contents of that letter. All these circumstances cannot but be considered as acts of acquiescence. The bankrupt then presents a petition for a supersedeas, which is brought on before the Vice-Chancellor and dismissed; from which decision he appeals to the Lord Chancellor, by whom the petition is again dismissed. It has been urged, that that dismissal ought to have no effect on our present decision, inasmuch as it was grounded on a formal objection made to the bankrupt's affidavit in reply; which, not being filed, could not therefore be read. But the bankrupt must have filed affidavits in support of the petition, in which he would have stated any merits, if he had them; and the answers to these affidavits were before the Lord Chancellor, who showed his opinion on the merits, by dismissing the petition with costs. If the bankrupt had really any merits to state in his affidavit in reply, he might have petitioned for a rehearing. There appears to me, therefore, ample grounds to restrain the bankrupt from trying the validity of this commission in a Court of Law, after so many decisions against him

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in other Courts, and so many acts of acquiescence in the commission, and more especially after his admission of the petitioning creditor's debt in his balance sheet. But it has been said, that although there might be good cause for the interference of the Court on this occasion, yet it ought not to interfere on behalf of these petitioners, on the ground of the commission being a fraud upon the Great Seal. But this point has already come before the Lord Chancellor on the hearing of the former petition, and might even now be brought before this Court, on a petition to supersede. There is therefore no reason why the bankrupt should go into a Court of Law, to try the validity of the petitioning creditor's debt. I do not, however, accede to Mr. *Twiss's* argument on this branch of the subject; for I think, that *White* had a good petitioning creditor's debt, and that his *bonâ fide* object was to get his debt satisfied and prosecute the commission; although it is very possible, that the bankrupt's partners might at the same time wish to dissolve their partnership with him. If this be so, then, the distinction drawn by Lord *Eldon* on former occasions applies to the present case; for where the real intention of the petitioning creditor was to work the commission, Lord *Eldon* said he would not supersede it, although the petitioning creditor might have also another object in view. The objections, therefore, which have been made to the validity of this commission, in my opinion, altogether fail.

It has been lastly contended, that the matter brought before us on this petition is *res judicata*, and that the decision of the Court of Exchequer is either a bar to our interference, or ought to operate as such a guide to our discretion, as to induce us not to interfere. But the

Court of Exchequer had not, on the present question, a concurrent jurisdiction with this Court. A motion was there made to dispauper the bankrupt, in the second action which had been brought by him against one of his assignees, and also to stay proceedings in the action. That seems to have been the object of the motion. The Court granted a rule to refer the matter to the Master; and pending the reference, the defendant withdrew from the rule; so that the question in the second action never really came before that Court, nor did the Court express any opinion upon the point. The Court of Exchequer merely discharged the rule, because the party who had obtained it had withdrawn from supporting it. Their decision is therefore no bar to any Court of Equity preventing a bankrupt from harassing his assignees with actions to try the validity of a commission, in which he has long acquiesced. If the bankrupt had any ground for superseding the commission, he ought to have applied to have the former petition reheard, and not to have proceeded by bringing vexatious actions at law against his assignees. It is therefore, I think, but due to the assignee, who is the present petitioner, to grant the injunction, as prayed.

Sir J. CROSS.—There was never an instance of more unfounded and vexatious litigation, than what has been exhibited in the present case. There have been already four hearings on petitions in the Court of Chancery, in all of which the bankrupt failed; and, after omitting to pay the costs which were given against him on these petitions, he brings three actions at law, in two of which he also fails,—not to mention two other actions which, it is alleged, he procured his son to bring. No source is

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to be found, from which he could defray the expenses of these proceedings, except from funds arising out of that estate which belongs to his creditors. Then, as to the proof of his acquiescence. He surrenders to the commission, without making any objection to its validity—asks for his allowance—opposes proofs, and assists the assignees in settling the partnership accounts, for eleven entire weeks,—and, after going on in this way for six months altogether, he then says that there is no petitioning creditor's debt, which he had admitted in his balance sheet, and to the truth of which he had previously sworn. He is, however, afterwards indicted for concealing his effects; and has then, for the first time, recourse to a petition to supersede the commission. *Pullen*, his solicitor, presents one petition, and the bankrupt another; and the bankrupt makes an affidavit in support of the petition presented by *Pullen*. These two petitions come on for hearing at the same time, and are both dismissed with costs. They are afterwards heard again by the Lord Chancellor on appeal; and the very question, which the bankrupt now seeks to try again at law, has been thus twice adjudicated upon. It was decided by the Lord Chancellor to be a valid commission. This Court is now asked to put an end to these expensive and vexatious proceedings; and it would be a monstrous evil, if it were not to protect the assignees from being further harassed by such ruinous expense and litigation.

Sir G. ROSE.—I never saw a clearer case for granting an injunction than the present; and it is perfectly consistent with the general principles which regulate the proceedings of Courts of Equity on these occasions, as

well as those which regulate the proceedings of this Court, that the injunction should issue under such circumstances as are here detailed. It has been settled, that the regular mode is now to proceed by petition in bankruptcy, instead of by bill in equity. There are two questions for the Court to look to ; first, whether a Court of Equity would restrain the bankrupt from proceeding in the action, on the general equity of the case ; and, secondly, whether the Court would supersede on his petition ? In determining the first question, we must take it, that the assignees of a bankrupt are in the situation of trustees under a settlement, and that the bankrupt is the *cestui que trust*. If the bankrupt, therefore, permits the assignees to go on and act as his trustees, they have a right to the same protection, as a Court of Equity would grant to any other trustee. Upon the *second* question, whether the Court would supersede this commission on the petition of the bankrupt, I think the Court ought not, under the circumstances of this case, to supersede on his petition. And the Court should, also, not permit needless expense to be incurred, by suffering him to proceed at law. It appeared to me to be a waste of time to consider how far the commission was, or was not, maintainable, if, on the general question as between trustee and *cestui que trust*, the Court should be of opinion that the action ought not to be maintained. But the affidavit of the bankrupt himself lets in a most material fact, namely, that he acquiesced down to a certain time in all the proceedings under the commission. The mere circumstance of the bankrupt applying for his allowance, perhaps, is not a complete admission of the validity of the commission. But it stands thus :

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the bankrupt tells his assignees, that there will be a large balance due to him out of the funds of the partnership in which he was engaged; and the assignees, upon the faith of this statement, grant him a certain allowance. All the facts now stated by the bankrupt were known to him, when he presented his former petition in 1831 to supersede the commission, and were nevertheless passed over in silence by him on that occasion. The dismissal of the former petitions is not quite conclusive against the bankrupt; but, looking at the whole matter as on a question of supersedeas, would this Court in 1835 supersede a commission issued in 1831, while the former orders then pronounced in favour of its validity stand still unrevoked? Mere lapse of time would be almost a sufficient answer to this question. But as long as the former orders of the Lord Chancellor exist, how can we displace these orders? The only regular mode of proceeding for the bankrupt was, to petition for a re-hearing before the Lord Chancellor. The only proper modes in which this Court can look at the question are, first, as between trustee and *cestui que trust*; and, secondly, as on a petition to supersede; and both these are against the bankrupt. I therefore concur in opinion with the other judges, that the bankrupt ought to be restrained from further proceeding at law against his assignees.

ORDERED, that the bankrupt be restrained from continuing the present, or bringing any other, action at law to try the validity of the commission.

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Ex parte JOHN VERE, FRANCIS SAPTE, and WILLIAM BRADBURY.—In the matter of JOHN BENTLEY, CHARLES DRARE, and JOHN JAMES MALLCOTT RICHARDSON.

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Westminster,
January 31.

THIS was the petition of indorsees to prove a promissory note of the bankrupts for 10,000*l.*, which they held under the following circumstances, as stated in the petition.

The petitioners, from 1st May 1833 to September 1834, were the bankers of *Gomersall Gandell & Co.*, who, on opening the account with them, requested them to discount bills for them, which the petitioners agreed to do. Whereupon *Gomersall Gandell & Co.* delivered to the petitioners the following memorandum or guarantee.

“London, 5th month, 1st 1833.

“*Vere, Sapte & Co.*

“Esteemed friends,—We engage to guarantee all bills you may discount for us from time to time from

G. & Co., to secure a permanent loan from their bankers, *V. & Co.*, to the amount of 20,000*l.*, agree to deposit with them their joint note for that amount, and, as collateral security, 10,000*l.* in bills not to be moved, and 10,000*l.* in bills to be with *G. & Co.* during the day, and also to leave a standing balance on the account every night, of 4000*l.* In pursuance of this agreement, *G. & Co.* every evening delivered to *V. &*

Co. bills of various amounts, but not less than 10,000*l.* on any occasion, unless their cash balance exceeded 4000*l.*; and every morning they received these bills back again from *V. & Co.*, which were either returned, or others of equal amount substituted, every evening. On the last day of dealing between the parties, *G. & Co.* informed *V. & Co.* that as they had drawn out the cash balance, which they ought to have left in their hands, they had given additional security to *V. & Co.*, by lodging bills with them to a larger amount. The amount of the sum so overdrawn was, in fact, 3000*l.*; and the amount of the bills then deposited was 22,666*l.*, including a note of hand of *B. & Co.* for 10,000*l.*, for which *B. & Co.* had only received a partial consideration from *G. & Co.*; but *V. & Co.* had no notice of such want of consideration attaching to this note. At the closing of the account between *G. & Co.* and *V. & Co.*, a balance was due to *V. & Co.* of 25,386*l.*, for which they held the deposit of the bills and note to the amount of 22,666*l.*, besides the note of *G. & Co.* for 20,000*l.* *G. & Co.* afterwards stopped payment, when *V. & Co.* gave them a letter of licence, which was however subsequently recalled. *B. & Co.* became bankrupt:—Held, that *V. & Co.* were entitled to prove the full amount of the note for 10,000*l.* against *B. & Co.*'s estate; but that as the specified purpose of the deposit of the bills by *G. & Co.* with *V. & Co.* was not to secure any general balance, but merely the two loans of 20,000*l.* and 3000*l.*, the bills deposited were to be considered only as a collateral security for those two sums, and not for the amount of the whole debt due to *V. & Co.*; that the proceeds of the other bills and of *G. & Co.*'s joint note must therefore be deducted from the 23,000*l.*; and that *V. & Co.* were entitled to receive dividends on their proof against *B. & Co.*'s estate, until they should have received full payment of the unsatisfied balance of this latter sum.

1835. the date hereof, unless any engagement is made to the
contrary. We are your assured friends,
Gomersall Gandell & Co."
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In March 1834, the business of *Gomersall Gandell & Co.* having considerably increased, they applied to the petitioners to assist them with loans of money, and to permit them to draw upon the petitioners for the same to the amount of 20,000*l.*, undertaking to give the petitioners their promissory note for 20,000*l.*, and to lodge bills and securities to the amount of 10,000*l.*, which were to remain in the possession of the petitioners until they respectively became due, and the petitioners received the amount. And further, to deposit with the petitioners, on the evening of every day, bills, notes, and other securities, to the amount of 10,000*l.* at the least; which last-mentioned securities were to be taken out every morning, and used by *Gomersall & Co.* in the course of their business; but the same were to be returned, or other bills and securities substituted to an equal amount, and deposited with the petitioners on the evening of every day. *Gomersall & Co.* also undertook to have a standing cash balance in the hands of the petitioners of 4000*l.*, on the close of every day's transactions on the account between them and the petitioners. The petitioners agreed to these terms, and accordingly in March 1834 advanced and lent, or otherwise placed to the account of *Gomersall & Co.* with the petitioners, the sum of 20,000*l.*; and the petitioners also received from *Gomersall & Co.* a promissory note for 20,000*l.* dated 3d of April 1834, bills and securities to the amount of 10,000*l.*, and other bills and securities to the amount of 10,000*l.* and

upwards. And it was further agreed between the petitioners and *Gomersall & Co.* at the time of entering into this arrangement, that the note for 20,000*l.*, and all the other bills and securities, as well as the standing cash balance, should remain with the petitioners for securing them the re-payment of the advance of 20,000*l.*, and indemnifying them against any loss which they might sustain either in respect of such advance, or in respect of any other advance which should be made to *Gomersall & Co.*, or otherwise, in respect of the account so kept by the petitioners as their bankers. Upon the footing of the above agreement, *Gomersall & Co.*, on the 20th March 1834, addressed to the petitioners the following letter :—

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“ London, 3d month, 20th 1834.

“ *Vere Sapte & Co.*

“ Esteemed friends,—It is our wish to have a permanent loan with your firm of 20,000*l.*, against which we are anxious to give you that security, that even under the most unlikely disastrous circumstances you would be protected, which we consider you would be, by lodging the following, viz. the joint note of our firm for the full amount of the loan; and, as collateral security, we will deposit 10,000*l.* in bills not to be moved, and 10,000*l.*, ditto, to be with us during the day; and further, a standing balance on the account every night of 4000*l.* We are respectfully, your friends,

“ *Gomersall Gandell & Co.*”

In pursuance of this agreement, *Gomersall & Co.* continued to draw upon the petitioners, from the time of the advance of 20,000*l.* up to and inclusive of

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Saturday the 20th September 1834; and during this period the permanent bills and securities remained in the hands of the petitioners for the purposes before mentioned, and *Gomersall & Co.* every evening delivered to the petitioners bills and securities of various amounts, but not less than 10,000*l.* on any occasion, unless their cash balance in the hands of the petitioners exceeded the sum of 4000*l.*; and every morning they received the last-mentioned bills and securities back again from the petitioners, to be used by them in the way of their business; which last-mentioned bills, or others of equal amount, were returned to the petitioners on the evening of every day. The petitioners alleged, that they considered themselves at liberty, if the state of the account of *Gomersall & Co.* rendered it expedient, to refuse to re-deliver to them, on the morning of any day, the securities which they had so deposited and lodged with the petitioners.

On the morning of the 20th September 1834, when the business of the banking-house commenced, *Gomersall & Co.* were indebted to the petitioners in the sum of 35,516*l.* 12*s.* 8*d.*; and the petitioners had in their hands cash of *Gomersall & Co.* to the amount of 1990*l.* 16*s.* 10*d.*, besides the promissory note for 20,000*l.*, and the other bills and securities permanently lodged with them; and they had also in their hands bills and securities, of which *Gomersall & Co.* were to have the use in the above manner during the day, amounting to 14,294*l.* 6*s.* 1*d.* These last-mentioned bills were delivered out to *Gomersall & Co.* in the ordinary course of business, and on the footing of the agreement; and various payments were made by the petitioners to the order, and on the account of *Gomersall & Co.*, during the last-mentioned day, at the close of which *Gomersall*

& Co. were indebted to the petitioners in the sum of *£5,386l. 12s. 8d.*, the cash balance of *Gomersall & Co.* remaining in the petitioners' hands amounting only to *6l. 0s. 4d.* Shortly before the closing of the bank on the evening of the 20th September 1834, *Gomersall & Co.* sent to the petitioners various bills and securities, on the footing of the before-mentioned agreement,—some of which were the same as those which had been delivered out to them in the morning, and others were substituted for those which had been disposed of by them in the course of their business on that day,—and they at the same time sent to the petitioners a message to the effect, that as they had disposed of some of the bills so delivered to them on the morning of the last-mentioned day, and had also drawn out the cash balance, which they ought to have left in the hands of the petitioners, they had given additional security to the petitioners, by means of the bills and securities so last delivered to and lodged with them. It appeared, that this over-drawing constituted a further loan of *£3000l.*, and that the bills last deposited amounted in the whole to the sum of *£22,666l. 14s. 2d.*; among these was the promissory note in question, which bore date the 15th September 1834, and whereby the bankrupts promised to pay to *Gomersall & Co.*, or order, three months after date, *10,000l.* for value received; and which note was indorsed by *Gomersall & Co.* to the petitioners. The account between the petitioners and *Gomersall & Co.* was closed on the evening of the 20th September 1834, without any further advance of money by the petitioners, who still retained in their hands the several securities above mentioned, including the promissory note for *10,000l.*

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Gomersall & Co. afterwards stopped payment, when *Vere & Co.* gave them a letter of licence for the payment of the balance due to them, but which letter of licence was afterwards recalled.

On the 30th September 1834, a fiat in bankruptcy was issued against *Bentley Deare & Co.* The petitioners had applied to prove the promissory note for 10,000*l.*, but the Commissioner rejected the proof.

The prayer was, therefore, that the petitioners might be at liberty to go in under the said fiat, and prove for the amount of the note; that, if it should appear expedient, all proper parties and witnesses might be examined *vivâ voce*, on the hearing of the petition; that all the examinations taken under the fiat, which related to the note and the petitioners' debt, might be ordered to be produced; and that no dividend might be declared, without making provision for the payment of so much as the petitioners might be entitled to receive in respect of their debt.

Mr. Swanston, Mr. Bethell, and Mr. Bacon, appeared in support of the petition. The defence, which it is supposed will be attempted to be set up by the other side, in opposition to this proof, is, that the note in question came into the hands of *Gomersall & Co.*, without their giving any consideration for it; and consequently that the petitioners, to whom they transferred it, had no better right, than *Gomersall & Co.* possessed against the bankrupts, the makers. There may be perhaps another view of the case presented to the Court by the respondents, and that is, that the note was obtained by *Gomersall & Co.* by fraud. It may be objected that *Bentley*, who deposited this note with *Gomersall & Co.*, had no authority to use the name of the

partnership firm, and therefore that the other partners are not bound by his acts. But the petitioners dealt exclusively with *Gomersall & Co.*, and had no transactions whatever with *Bentley Deare & Co.* [*Erskine, C. J.* If the note was not paid away by *Gomersall & Co.*, but merely deposited with the petitioners as a pledge, then the petitioners would take it with all its infirmities.] The note was deposited with *Vere & Co.* for a valuable consideration, namely, for a *bonâ fide* debt owing to them by *Gomersall & Co.*, which all the securities held by them were not sufficient to realize. *Gomersall & Co.* therefore could not take this note out of the hands of *Vere & Co.*, without paying them the debt. A promissory note is a negotiable instrument; and consequently the legal interest in this note passed to *Vere & Co.* by the mere delivery of it from *Gomersall & Co.* There was nothing, on the face of the note, to excite any unusual vigilance on the part of *Vere & Co.*, nor had they the slightest reason to suspect that any fraud had entered into the composition of the note. [*Sir G. Rose.* Although *Vere & Co.* had the dominion of the note, still it was a dominion clothed with a trust for the benefit of *Gomersall & Co.*, the *cestui que trusts*; and it then becomes a question, whether a trustee can enforce against a third party what the *cestui que trust* has no power to enforce.] [*Erskine, C. J.* As *Bentley & Co.* appear in this transaction to have been in the nature of sureties for *Gomersall & Co.*, may they not insist upon your realizing first all the securities as against *Gomersall & Co.*, before you are entitled to make any claim against *Bentley & Co.*?] The note was made payable to *Gomersall & Co.*, and was indorsed by them before they delivered it to *Vere & Co.* [*Erskine, C. J.* That you can recover at law, is clear; but when you

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recover at law, the question is, for whom you hold the proceeds.] The state of the account between the petitioners and *Gomersall & Co.* decides that question clearly in favour of the petitioners; for the balance due to them from *Gomersall & Co.* exceeds the whole amount of the securities they held. Mr. *Deare* has made an affidavit on behalf of the respondents, in which he swears that *Bentley* was guilty of fraud, and that *Gomersall & Co.* were privy to the fraud. But though *Deare* and *Richardson* both complain that their partner *Bentley* had defrauded them, they nevertheless permit him to continue to manage the financial concerns of the house. Mr. *Deare* then swears, that *Gomersall* lent money to *Bentley* to enable him to abscond, and that no consideration was given for the note by *Gomersall & Co.* But all these allegations fail to show, that *Vere & Co.* had any notice whatever of the transactions between *Bentley* and *Gomersall*. It appears, that the Commissioner's reasons for rejecting the proof was, that the note was obtained by fraud on the part of *Gomersall & Co.*, and that whether it was obtained by fraud, or was stolen, was precisely the same thing; that as *Gomersall & Co.* could have no right against *Bentley & Co.*, in respect of the note, so *Vere & Co.* could have no better right; that the note could not, under these circumstances, be brought into the market; and that the note, being for so large an amount as 10,000*l.*, ought to have excited the vigilance of *Vere & Co.* in ascertaining its validity. But whatever might be the fraud as between *Bentley & Co.* and *Gomersall & Co.*, there was none whatever as between the latter and *Vere & Co.* The note passed from *Gomersall & Co.* to *Vere & Co.* in the same way as the other securities. *Bentley* was the accredited agent of the house, and drew the note whilst

having full authority so to do. It will be contended, however, that *Bentley & Co.* must be treated as sureties for the payment of the sum mentioned in the note, and that *Vere & Co.* have released them by giving time to *Gomersall & Co.* But the case of *Carstairs v. Rolleston* (a) is an answer to that mode of reasoning; for it was there held, that a release by the indorsee of a promissory note to the payee, who had indorsed it, did not prevent the indorsee from recovering against the maker. [Sir G. Rose. *Bentley & Co.* may still call on *Vere & Co.* to dispose of all the available securities in their hands, before they come upon *Bentley & Co.* for the amount of this note.] The case of *Ex parte Blarham* (b) is an authority in favour of this proof, and the only question is, as to the propriety of any reservation of the dividends.

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Mr. *J. Russell*, and Mr. *Hoggins*, for the respondents. It appears by the examination of *Gomersall* before the Commissioner, that *Gomersall & Co.* were largely indebted to *Bentley & Co.* at the very time that *Bentley* drew this note; therefore *Vere & Co.* could have no more claim, even at law, against *Bentley & Co.* on the note, than what *Gomersall & Co.* possessed. The fact is, that *Bentley's* partners have accused *Gomersall & Co.* of passing bills and notes into the market, which they knew to have been forged by *Bentley*. Neither *Deare* nor *Richardson*, who were *Bentley's* partners, knew any thing of this promissory note for 10,000*l.*, until after the insolvency of *Gomersall & Co.* But the right of *Vere & Co.* to come upon the makers of this promissory note is very questionable, even if the note had been a good one, and had been given to *Gomersall & Co.* for a valu-

(a) 5 Taunt. 551.

(b) 8 Ves. 531.

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able consideration; for there was no absolute transfer of the note to *Vere & Co.* The floating deposit of bills and notes, which were left with them every night by *Gomersall & Co.*, might be taken away by *Gomersall & Co.* the following morning; they kept the key of the case in which the notes were placed, and *Vere & Co.* had no right to appropriate any of them to the liquidation of their account. The indorsement of *Gomersall & Co.*, which appears on this particular note, is a strong proof of fraud on their part; as it was quite contrary to their usual mode of business for them to indorse any of the notes, which they deposited with *Vere & Co.* *Vere & Co.* then can have no better right against *Bentley & Co.*, than *Gomersall & Co.* possess; for the mere fact of the delivery of a bill of exchange to a party who is a creditor, does not amount to a transfer of the bill; as the pre-existing debt does not, of itself alone, constitute the party a holder for valuable consideration; *De la Chaumette v. Bank of England* (a). In order to create a consideration, there must be some subsequent dealing, some forbearing by the creditor to sue or press the debtor. [*Erskine*, C. J. Was there not such a contract of forbearance here, by reference to the previous agreement between *Vere & Co.* and *Gomersall & Co.*?] *Vere & Co.* were mere trustees in this case, and accountable to *Gomersall & Co.* *Bentley & Co.* must be considered in the character of sureties for *Gomersall & Co.*; and as *Vere & Co.* have given a letter of licence to *Gomersall & Co.*, they have consequently discharged *Bentley & Co.* the sureties. It is true, that the letter of licence was afterwards recalled; but it is immaterial, whether the time given was a year or a day; for if it was for ever so short a time, it equally discharges the surety; *Ex*

(a) 9 B. & C. 208.

parte Smith(a). Supposing, however, that *Vere & Co.* had a right to appropriate to their own use any of the bills and notes, which had been deposited with them for a special purpose, no act of appropriation in fact took place until after the bankruptcy of *Bentley & Co.*, when *Vere & Co.* for the first time entered this note in their books. But the respondents rely upon the point they have before urged, that the note was fraudulently procured from *Bentley* by *Gomersall & Co.*; and that *Vere & Co.*, not having used due caution in inquiring into the real state of circumstances under which *Gomersall & Co.* obtained possession of the note, can stand in no better situation than *Gomersall & Co.*; *Gill v. Cubitt*(b), *De la Chaumette v. Bank of England*(c), *Strange v. Wigney*(d).

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Mr. *Swanston*, in reply. It is not necessary to enter into a minute scrutiny of the transactions between *Gomersall & Co.* and *Bentley & Co.* The only question in this case is, did the note come into the possession of *Gomersall & Co.* by fraud, or by contract? If by fraud, then indeed an ulterior question might arise, as to whether the petitioners had notice of the fraud. But it is clear, from *Gomersall's* examination before the Commissioner, that it came into their possession by contract. He there states, that the note in question was with others deposited with him by *Bentley*, in consequence of a previous arrangement made between them; and that on the 17th and 18th August, application had been made to him by *Bentley*, for advances to enable *Bentley's* house to carry on their business. *Bentley* makes a definite arrangement, ascertains the

(a) 3 Brown, 1.

(b) 3 B. & C. 466.

(c) 9 B. & C. 208.

(d) 6 Bing. 577.

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amount that will be required, and then this note along with others was given by him to *Gomersall & Co.* As to the improbability that *Bentley's* partners should continue their confidence in him, so as to permit him to make this arrangement,—the fact was, as avowed by *Deare* in his affidavit, that they did do so; and the arrangement was made just before a projected journey of *Bentley* into Yorkshire, where he expected to receive a large sum of money. If the case is to rest on the performance by *Gomersall & Co.* of the contract made by them with *Bentley*, we say that the contract was performed by the stipulated advances being made. The cases cited on the other side have no application to the present; they all turned on the question of fraud. In *Gill v. Cubitt (a)*, the bill of exchange had been stolen, and the question there was, whether the holder of it was a *bonâ fide* holder. [Sir J. Cross referred to *Ex parte Ellis (b)*, where a point arose somewhat similar to that in this case.] If the note then is to be considered as acquired by contract by *Gomersall & Co.*, and as such available in the hands of a *bonâ fide* holder, there is an end of the case. For in the mode in which *Vere & Co.* acquired the possession of this note, there is nothing to interfere with their right to render it available towards the liquidation of the debt due to them from *Gomersall & Co.*; nor would the state of accounts between *Gomersall & Co.* and *Bentley & Co.* in any way vary that right. As to the construction of the agreement of *Gomersall & Co.* to deposit every evening with *Vere & Co.* bills to the amount of 10,000*l.*, which were to be returned in the morning to *Gomersall & Co.*, and used by them during the day,—it is verified by the affi-

(a) *Supra*.

(b) 2 Deac. & Ch. 545. Reversed on appeal, 3 Deac. & Ch. 376.

davit in support of the petition, that the bankers had a right, if they chose, to refuse to re-deliver the bills in the morning; and that *Gomersall & Co.*, instead of getting credit from *Vere & Co.* to the amount of 20,000*l.*, the sum stipulated in the agreement, obtained credit with them to the extent of 33,000*l.* [*Erskine, C. J.* The difficulty you have to contend with is, whether you can carry the case of the deposit of a note as a pledge, further than the case where a note is delivered by a party to another, to whom he owes an antecedent debt; in which case Lord *Tenterden* held, that the mere delivery of the note, without any thing further, would not pass the property in it (a).] It has been the uniform practice in bankruptcy, to allow the holder of a bill, which is given in payment of a pre-existing debt, notwithstanding it may be an accommodation bill, to prove the amount under a commission against one of the parties to it. The case before Lord *Tenterden* was not one relative to an accommodation bill, but a Bank of England note, which had been stolen before it got into the hands of the party who remitted it to his creditor. In this case, *Gomersall & Co.*, on the morning of the 20th September, were indebted to *Vere & Co.* in the amount of 35,000*l.*; this was 15,000*l.* more than was anticipated, when the parties entered into the agreement. The course of dealing between them was, that the very moment the bills and notes reached the bankers by their clerk, they were entitled to hold them as securities. In the morning of that day, *Vere & Co.* delivered out securities to *Gomersall & Co.* to the amount of 14,000*l.*, and paid their drafts to the amount of 2000*l.*, and in the evening *Gomersall & Co.* delivered to them bills amounting to 12,000*l.*, besides this note for 10,000*l.*

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(a) See *De la Chaumette v. Bank of England*, 9 B. & C. 217.

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There was therefore a good and ample consideration given by *Vere & Co.* for this note. It is quite clear, that there was no contract or dealing of any kind between *Vere & Co.* and *Bentley & Co.*, nor any privity as to the dealings between *Bentley & Co.* and *Gomersall & Co.* But it so happens, that the paper of *Bentley & Co.* comes into the possession of *Vere & Co.* by the ordinary legal transfer; and what we contend for is, that *Vere & Co.* have a right to marshal these securities, so as to make them the most available for the payment of their debt. We do not rest their claim merely on the written memorandum, but also on the daily course of dealing between the parties. [Sir J. Cross. If *Gomersall & Co.* had asked any person to accommodate them with his acceptance, to be sent in to *Vere & Co.* in the evening, would not the acceptor be held liable to *Vere & Co.* for the amount?] There can be no doubt that *Vere & Co.* might sue that party on his acceptance. With respect to *Vere & Co.* being considered trustees for *Gomersall & Co.*, it is very true they may be so in some sense of the word, as all other persons are to a certain extent, with whom any property is lodged to secure the payment of a debt. But when do they become trustees? Not till after their debt is paid; nor ought they, under that pretence, to be deprived of the right of availing themselves of the security towards satisfaction of their debt. It is a settled rule, with respect to bills deposited with a party as collateral securities for a debt, that he has a right to prove on all the securities, until he receives 20s. in the pound on the amount of his debt; *Ex parte De Tastet* (a).

ERSKINE, C. J.—If this note had been handed over

(a) 1 Rose, 10.

to the petitioners in the ordinary way of business, or by way of discount, it would have been then immaterial to consider what was the state of circumstances, as between *Gomersall & Co.* and *Bentley & Co.* But such was not the mode of transfer; it was delivered to the petitioners, in pursuance of a previous special arrangement made between them and *Gomersall & Co.* It is said, that as all the bills, which were handed over to the petitioners in the evening of the 20th September, were deposited as a security for the general balance due to them from *Gomersall & Co.*, and the petitioners might sue at law upon them, they have therefore a right to prove the amount of this note against the estate of *Bentley & Co.*; and that it would be no answer to say, that the note had been obtained by *Bentley & Co.* by fraud,—or that the bankrupt was entitled to insist on the other securities being applied by the petitioners, in the first instance, towards the payment of their debt, amounting, as it did, to so large a sum as 35,000*l.* But it appears to me, that that is not the true way of considering this question; for the bills were not paid away to *Vere & Co.*, nor intended to be appropriated by them to their own use, but were to be restored to *Gomersall & Co.* the following morning. Their right, therefore, to make them available would depend on two circumstances, namely, the state of the account between *Vere & Co.* and *Gomersall & Co.*, and the state of the account between *Gomersall & Co.* and *Bentley & Co.* The law on this subject is laid down by Lord *Eldon* in his judgment in *Ex parte Bloxham* (a). If there had been a good consideration given by *Gomersall & Co.* to *Bentley & Co.* for the note, then, according to what Lord *Eldon* says in the case referred to, the petitioners

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(a) 8 Ves. 531.

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might prove against the estate of *Bentley & Co.*, and receive dividends on the amount of such proof; but if it was an accommodation note, the petitioners, although they might prove the amount of the note against *Bentley & Co.*, would only be entitled to dividends on the amount of the real consideration given for the note by *Gomersall & Co.* to *Bentley & Co.* It has been contended, that as the note was deposited as a general security with *Vere & Co.* for the payment of the balance of \$5,000*l.*, they could avail themselves of it to its full extent. But as it was not given in payment of a debt, nor for the purpose of being discounted, it would depend on the state of accounts between *Gomersall & Co.* and *Bentley & Co.* as to what interest passed to the petitioners. It has been said, that the note was obtained by *Gomersall & Co.* by fraud; but I do not think that either *Gomersall*, or his partner *Gandell*, was cognizant of any fraud. They might have had good reason for supposing that *Bentley* was acting with the authority and approbation of his partners, and that he drew the note, in pursuance of the previous arrangement made when all parties were present. Still it must be considered, as being in the character of an accommodation note; for at the time this note was delivered to *Gomersall & Co.*, there were other securities in their hands, which had been previously delivered to them by *Bentley*, and the subsequent advances of *Gomersall & Co.* were on the faith of other bills. But, supposing that the advances made by *Gomersall & Co.* were on the faith of this note for 10,000*l.*, still the amount of those advances being only 1600*l.*, they would only have a claim to that extent. Then, would the deposit of this note by *Gomersall & Co.* with *Vere & Co.* give the latter a greater right, than what *Gomersall & Co.* them-

selves possessed? My present impression is, that it would not. But there is also this further circumstance in the case. The note was deposited in pursuance of a previous agreement, under which 10,000*l.* in bills were to be deposited by *Gomersall & Co.*, which were not to be moved, and 10,000*l.* more in bills, which were to be with *Gomersall & Co.* during the day, but to be again deposited, or other bills to the like amount, every evening with *Vere & Co.* The bills and notes therefore deposited every evening were a collective security, in conjunction with the other bills and notes to the amount of 10,000*l.*, which were left as a permanent security. It appears, that on the evening of the 20th September *Gomersall & Co.* deposited with the petitioners bills and notes to the amount of 22,666*l.* 14*s.* 2*d.*, which, with the 10,000*l.* previously deposited as a permanent security, would amount to a deposit of more than 32,000*l.*, as a security for the stipulated advance of 20,000*l.* Then, have not the assignees of *Bentley & Co.* a right to say to the petitioners—‘ you must first account for all the other securities, before you can come against our estate?’ Now, it is nowhere shown, that any portion of the 20,000*l.* would be due to *Vere & Co.*, if all the other securities were to be made available, and the proceeds to be applied in reduction of that sum. If they had shown this, I should hold that they might then prove against *Bentley & Co.*’s estate for the amount of this note, and receive dividends on their proof until the amount of the balance of the 20,000*l.*, but not the balance of the whole of their debt, was completely discharged. For, notwithstanding the sum of 35,000*l.* was actually due to *Vere & Co.* at the time of the deposit of the note, yet, according to the terms of the agreement, the note was only in fact deposited

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to secure the sum of 20,000*l*. It therefore appears to me, at present, that the petitioners have not made out a case to entitle them to prove the amount of the note against the estate of *Bentley & Co.* But I should wish to consider the case a little further, before I deliver my final opinion.

Sir J. CROSS.—As the Court intend to consider of their judgment, I had rather say nothing at present. The importance of the case certainly deserves a deliberate judgment.

Sir G. ROSE.—If I were satisfied, that on the 20th September *Vere & Co.* were the *bonâ fide* holders of the note, for a valuable consideration, then I should think that they would have a right to prove the amount of it against the estate of *Bentley & Co.*, without any regard to the state of the account between *Gomersall & Co.* and *Bentley & Co.* If, for instance, I could find that the note was passed by *Gomersall & Co.* to *Vere & Co.* in payment of an antecedent debt, then I should say that *Vere & Co.* were the legal holders. But it is impossible to say, that the note ever passed to them, *quâ* payment; for this, as well as the others which accompanied it, were reclaimable by *Gomersall & Co.* in the morning. If the note had been entered by *Vere & Co.* to the credit of *Gomersall & Co.*'s account, or the amount of it had been carried by them *in rem solutam*, that perhaps might have given them a right of proof. But the bankruptcy of *Bentley & Co.* must now govern the right of *Vere & Co.*, as it existed when the bankruptcy took place. We can only imply, that a consideration was given by them for the note, by reverting to the agreement. The terms of the agreement would

certainly raise a consideration; but then it must be dealt with strictly within its terms; and we there find, that the deposit of the bills and notes was intended as a collateral security for the loan of 20,000*l.* It has been contended by Mr. *Swanston*, that as *Vere & Co.* were creditors of *Gomersall & Co.* to the amount of 35,000*l.*, that circumstance would give them a greater right of proof upon this note. But it appears to me, that they can have no other right than what is referable to the agreement, which only contemplated a daily deposit of bills and notes, to secure 20,000*l.* With regard to the law as applicable to the drawers and acceptors of bills of exchange, it is quite sufficient, I admit, at law, merely to look to the instrument, in order to ascertain the rights and liabilities of the respective parties. But in bankruptcy, where the assets are equitably distributed, the practice is different; so that although the holder of a bill might clearly recover on it at law, yet in bankruptcy many circumstances might prevent his proof. I must first inquire into the nature of the contract between the original parties to the instrument, before I can admit the holder's right to prove against the acceptor. And, in the present instance, I must ask myself, what value the makers of this note have received from those to whom it is made payable, before I can determine, that the petitioners have a right to prove the amount against the estate of the makers; and it would require something more to satisfy me on this head, than what I have already collected, as to the amount of the advances made by *Gomersall & Co.* to *Bentley & Co.* I think, that the bankrupts can only be treated as *quasi sureties* for *Gomersall & Co.*

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and may claim the benefit of every incident of which a surety is entitled to avail himself for his own relief.

The case stood this day for final judgment, when a new affidavit was tendered to explain some facts as to the dealings between *Bentley & Co.* and *Gomersall & Co.*; which gave rise to a somewhat irregular and protracted discussion. The affidavit, however, was finally rejected; and the Chief Justice then pronounced the following judgment:—

ERSKINE, C. J.—If the topics which have been urged to-day by the counsel on either side, had been overlooked by the Court in forming its opinion, or if the argument now pressed upon us had laid any just ground for further deliberation, the Court would willingly have given the case further consideration; but as all the points now suggested have been already fully considered, it will be unnecessary further to delay the judgment of the Court.

The question arises upon a proof tendered by *Vere & Co.*, under a fiat against *Bentley & Co.*, upon a promissory note made by *Bentley* in the name of his firm, for 10,000*l.*, payable to *Gomersall* and *Gandell*, and by them specially indorsed to *Vere & Co.* The proof was rejected by the Commissioner, upon the ground, as it should seem, that the note had been obtained by *Gomersall* by fraud, and had been received by the holders without due caution. Upon this, *Vere & Co.* petitioned this Court that their proof might be admitted, and their application has been resisted by the assignees on these grounds: *first*, on the ground of fraud; *secondly*, that at least the note was given by *Bentley &*

Co. without consideration; and that having been deposited with the petitioners as collateral security for a pre-existing debt, the holders could have no better title than the indorsees, and that as *Gomersall* and *Gandell* could not have proved against *Bentley & Co.*'s estate, so neither could the petitioners; and *thirdly*, that the bankrupts were, in substance and in equity, only sureties for *Gomersall* and *Gandell*, and that the petitioners had given time to *Gomersall & Co.*, and had thereby discharged *Bentley & Co.*

We are all of opinion, that the first objection is not made out, in fact. When the case was before the Commissioner, it appeared that *Bentley* had drawn the note in question, with another for a like sum, in the name of his firm, on the 18th of September last in *Gomersall*'s presence; and that a few days before, *Bentley*'s partners had disclosed to *Gomersall* their suspicions, that *Bentley* had been guilty of fraudulent practices in circulating the paper of the firm, and intimated their intention of withdrawing from *Bentley* the management of their pecuniary affairs, which had till then been principally entrusted to him; and there was no direct evidence before the Commissioners, to show for what purpose the notes had been given, except that *Gomersall* stated that they were drawn in pursuance of an arrangement made between his partner *Gandell*, and *Bentley*'s partners; but *Gandell* was not examined before the Commissioner, to explain what this arrangement was. By an affidavit, however, made in this Court, an explanation is given by *Gandell* upon that head, to the effect that it had been agreed between himself and *Bentley*'s partners, that they should

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give their notes as a security for monies to be advanced by *Gomersall & Co.* to *Bentley & Co.*, as occasion might require. And it appears, that the sum of 1660*l.* was actually advanced thereon. But it is said, that *Gandell's* affidavit was filed so late, that the assignees had no opportunity of answering it, which they could have done by a direct contradiction; and it is to-day, for the first time, asked, that the case may again stand over, to afford the assignees the opportunity of so doing. It might be a sufficient answer to this application, to say, that it should have been made at an earlier stage of the proceedings. But we are of opinion, that, independently of *Gandell's* affidavit, there is not sufficient evidence of any fraudulent collusion between *Gomersall* and *Bentley*; and that if there had been, as there is no evidence of any knowledge of such fraud, or of any want of due caution, on the part of *Vere & Co.*, the objection, as against them, must fail; and that the cases of *Gill v. Cubitt*, *Strange v. Wigney*, *De la Chaumette v. The Bank of England*, and the other cases cited on the argument, do not apply. And though it is true, that a partial consideration only was given by *Gomersall* and *Gandell*, and that for the residue *Bentley & Co.* may be considered in this Court as mere sureties; yet we are of opinion, that that circumstance, and the fact that the note was transferred to *Vere & Co.* as a security for a pre-existing debt, present no valid objection to their proving it under *Bentley's* bankruptcy. For this, the cases of *Ex parte Crosley (a)*, and *Ex parte Bloxham (b)*, would be sufficient authorities, if authority were wanting; and these cases are in no degree affected

(a) Cook's B. L. 157.

(b) 6 Vez. 449.

by the dictum of Lord *Tenterden* in *De la Chaumette v. The Bank of England*, which was pressed upon us at the argument,—for that observation was founded upon the conclusion, that the plaintiff in that case held the note merely as the agent for the party from whom he received it.

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It was next said, that *Vere & Co.* had given time to *Gomersall & Co.*, and had thereby discharged *Bentley & Co.* But even if we consider *Bentley & Co.* in the light of mere sureties for *Gomersall & Co.*, and assume that *Vere & Co.* gave *Gomersall & Co.* time, which was but indistinctly proved, this, in the absence of all evidence that *Vere & Co.* knew that the note was given without consideration, would afford no answer to their claim; for it was decided in the case of *Carstairs v. Rolleston* (a), that even a release of the payee of an accommodation note, when the holder was ignorant of the fact that it was an accommodation note, was no discharge of the maker. All the objections, therefore, raised by the assignees to the proof claimed by the petitioners have been, we think, satisfactorily answered. But it occurred to the acute and experienced mind of Sir *George Rose*, that as *Gomersall & Co.* had deposited with *Vere & Co.* other securities to the amount of 22,666*l.*, as a collateral security for the same debt in respect of which the 10,000*l.* note was deposited, the assignees of *Bentley & Co.* had, as representing the creditors of a surety, an equitable right to have those securities applied to the liquidation of that debt, and to insist that the estate of *Bentley & Co.* should be made responsible only for the unpaid balance. And we are all of opinion, that in the result the bank-

(a) 5 Taunt. 551.

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rupt's estate can only be called upon to make good any deficiency that may remain after realizing those securities. But we are also of opinion, that the bankrupt's estate is liable to the full amount of such deficiency, not exceeding 10,000*l.*, and that *Vere & Co.* are therefore entitled to prove to the full amount of the note; but to receive dividends, only, until from the dividends and the proceeds of such other securities they shall have received 20*s.* in the pound upon the debt, for which the securities in question were given. That this is the true and the only limit of the petitioner's right, is clearly established by the cases collected in *Mr. Cooke's Bankrupt Law*, page 176, the result of which he sums up thus:—"If a bill of exchange or promissory note is drawn by way of accommodation, yet the party holding it for a valuable consideration, though less than the amount, is entitled to prove against all the parties but those from whom he received it, to the whole extent of the bill or note, and receive the dividends, provided they do not amount to more than 20*s.* in the pound on the consideration that he gave." It is true, that in the case of *Ex parte Bloxam, in the matter of Purdy* (a), Lord *Rosslyn* held, that as the creditor could only recover against an accommodation acceptor, at law, damages to the amount of the debt due to the holder from the indorser, so he could only prove to the same amount in bankruptcy. But the same question having been raised by the same petitioners in another bankruptcy before Lord *Eldon*, as reported in 6 *Vez.* 449., Lord *Eldon* recognized the doctrine established by the earlier cases, and held, that the holder was entitled to prove for the full amount of the note, and to receive

(a) 6 *Vez.* 448.

dividends till the debt was fully paid, saying, if the petitioners can only prove the amount of their *debt*, they have not the full benefit of the security; and afterwards, upon a re-hearing of the former petition in the matter of *Purdy*, Lord *Eldon* ordered the proof to be admitted to the full amount of the bill; although in that case, as in this, the creditor also held the acceptances of other parties as security for the same debt; but he limited his right to the dividends upon that proof to such sums as would, together with the proceeds of the other securities, pay 20s. in the pound on the debt, for which such securities were given.

With a view therefore to the dividends, though not to the proof, it becomes material to ascertain the amount of the debt, to which the securities in question are applicable. On the part of the petitioners, it was contended that they were entitled to apply them to the liquidation of the whole balance due to them at the time of *Bentley & Co.*'s bankruptcy; and that as the debt would exceed the aggregate amount of all the securities, they were not only entitled to prove, but to receive dividends to the full amount of the 10,000*l.*, independently of all reference to the value of the other securities. First, they insisted that the securities were expressly deposited as a collateral security for the whole balance of 35,000*l.*; and, secondly, that if not expressly deposited for that purpose, yet that being in their hands as bankers, they were entitled in right of their general lien to apply them to their general balance. At the time of the argument, I was inclined to think that the deposit made on the 20th of September could only be taken as made under the written agreement; and that all the securities must be taken, as placed in the hands

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of *Vere & Co.* to secure the re-payment of the original loan of 20,000*l.* and interest. But, upon looking more carefully into the depositions, I think it is plain, that though the permanent deposit of the securities for 10,000*l.* was made for the original loan only, yet that the note in question, and the other contents of the bill-case left on the 20th of September, were deposited as security for the second loan of 3000*l.*, as well as for the original loan of 20,000*l.*, thus making the amount of the debt secured by the deposit larger than the amount of the securities, exclusive of *Gomersall & Co.*'s and the note in question; and I am now satisfied, that there is nothing to prevent our giving full effect to the contract of the parties in respect of that deposit, though made to secure a pre-existing debt. But it is perfectly clear from the evidence, that neither the depositors, nor the depositaries, considered the securities as pledged for any larger amount; on the contrary, they all admit, in their examination before the Commissioners, that the contents of the bill-case were expressly left as a security for the 23,000*l.*

This brings us then to this question, whether the bankers have, in respect of their general lien, a right to apply the proceeds of these securities to the further balance said to be due to them in respect of discount transactions, wholly distinct from the loans which the securities were intended to secure? As a general proposition, it is true that a banker has a lien for the general balance of his account on all securities in his hands, whether expressly deposited for that purpose, or not. But upon what ground does this lien rest? Not upon any inflexible principle of the common law, but upon an implied contract arising out of the general

course of dealing amongst bankers, in which every customer is presumed to have acquiesced, unless the contrary appears. But no such inference can be drawn, when an express contract, inconsistent with that inference, is proved ; and in this case, the debtor having expressly deposited these securities, as a security for a specific portion only of a general balance then due, all inference that it was intended as a security for the whole of the general balance is excluded ; and this view of the case is supported by the decision in *Vanderzee v. Willis* (a), to which Mr. *Styanston* has referred. If, then, the petitioners have no lien on the securities for any sum beyond the 23,000*l.* and interest, a Court of Equity would compel them to apply the proceeds of those securities to the liquidation of that debt, and would restrain them from recovering against the surety more than the balance left unsatisfied. When, therefore, this Court is called upon, in the administration of the surety's estate, to order the petitioners' proof to be admitted, it is bound to protect the interests of the other creditors, by restraining the payments in respect of that proof, so as to work out for them all the equities which the surety, if solvent, might have enforced by suit. And this may be done, by directing the proof to be admitted for the whole 10,000*l.*, and by declaring that the note in question, and the other securities in the petition mentioned, were held by *Vere & Co.* as collateral securities for the two loans of 20,000*l.* and 3000*l.*, with interest ;—that the proceeds of the other securities shall be deducted from that debt ;—and that *Vere & Co.* are entitled to receive dividends on their proof, until they shall have received full payment of the unsatisfied balance.

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(a) 3 Br. C. C. 21.

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Ex parte JOSEPH DAVY and WILLIAM LEE, assignees,
and HENRY MUNN.—In the matter of EDWARD
CHAMBERS, HENRY CLARKE GRANGER, and RICHARD
CHAMBERS.

Jan. 15 and 16.

Upon very slight circumstances of acquiescence, and where the bankrupt has lain by for 22 years without taking any active steps to upset the commission, this Court will, upon petition of assignees and a purchaser under the commission, grant an injunction to restrain actions commenced by the bankrupt against purchasers under the commission.

THE facts of this case were, that the bankrupts were bankers in copartnership, and on the 2d of October 1812 a joint commission issued against them, and *Humphrey Mills* was chosen assignee. *Mills* was subsequently declared bankrupt, and *William Brown* was chosen in his stead. He, however, died in the year 1823, whereupon the petitioners *Davy* and *Lee* were appointed. The separate estate of *Granger* formed the principal funds to be distributed. It consisted of many freehold and leasehold houses, rent-charges, and ground rents: but shortly previous to the commission, *Granger* attempted to convey away this property to one *William Fry*, to whom it was assigned without consideration, and to whom possession was given. The recovery of the property occasioned the assignees much litigation with *Fry*, who was aided by *Granger*, and who threw every difficulty in the way of the assignees, by refusing to surrender himself to be duly examined under the commission. In 1812 *Granger* however applied for an enlargement of the time for his surrender, but he never surrendered himself accordingly; whereupon warrants were issued for his committal, which were not executed, as *Granger* kept out of the way for several years afterwards.

In August 1818 *Granger*, by the assignees' consent, obtained an order for the Commissioners to receive his surrender, and for passing his examination, and the

19th March 1819 was appointed for that purpose ; but in consequence of his gross prevarications, he was, after several adjournments, committed to Exeter Castle, under warrant bearing date the same month of March 1819. After several subsequent attempts to induce him to give satisfactory answers, between the years 1819 and 1823, he was, at length, on the 1st May 1823, discharged from custody, under the impression that he was, and had been for some time previously, in a state of unsoundness of mind. His conduct caused great increase of expense to the estate ; and as no satisfactory disclosures were made, it became necessary that the litigation with *Fry* should be compromised. A dividend of 10s. in the pound had however been declared. Soon after *Granger's* discharge from custody, namely, in Michaelmas term 1824, he commenced an action of trover against one *Richard George*, for the recovery of a box, containing things of no value, alleged to have been deposited with him by the bankrupt. *George* delivered the box to *Brown*, the then assignee ; and he *Brown*, as the action was in fact brought to disturb the commission, defended it ; and, upon a plea of the statute of limitations, the bankrupt was nonsuited. The costs of this action, though taxed, were never paid by the bankrupt, as he kept out of the way. In April 1825, and in October 1828, with *Granger's* knowledge, various estates of *Granger's* were sold in different lots to different purchasers, which sales were all duly completed by the assignees ; Mr. *Munn*, the petitioner, being a purchaser of one of the lots. The sale of these estates had been much delayed in consequence of the litigation with *Fry*, and the consequent inability to complete the title. All the purchasers had been greatly annoyed by

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the vexatious claims and threats of proceedings at law by *Granger*; and in 1832 he commenced no less than eleven actions of ejectment against eleven different purchasers of the estates, one of whom was the petitioner *Munn*; whereby the assignees were also much harassed by claims for indemnity by these different purchasers. *Granger* never passed his final examination, nor did he ever obtain his certificate.

The petition then alleged, that during the 21 years for which the commission had subsisted, *Granger* never, upon any occasion, took any step to try, in a lawful and regular manner, either by action at law, petition, or otherwise, the validity of the commission; except that on the 28th September 1832 he presented a petition to this Court, praying to supersede it, as to himself. This petition was however dismissed with costs, to be paid by the bankrupt, on the ground, as it appeared, of his long acquiescence under the commission. These costs were never paid, as the bankrupt contrived always to keep out of the way, and was in a very low state of circumstances. The two other bankrupts, *Edward* and *Richard Chambers*, died long since, having duly submitted to the commission, and obtained their certificate, and without having ever disputed the validity of the commission.

In addition to these facts, which were stated in the petition, it also appeared that the assignee, *Brown*, about the year 1814, had commenced an action against some party under the commission, which was tried at the assizes. He went down prepared to prove the joint act of bankruptcy, but was taken by surprise, and failed to support the commission, and was in consequence nonsuited. He afterwards moved for

and obtained a rule for a new trial, but it did not appear what further proceedings were taken.

The petition prayed an injunction against the bankrupt, *Granger*, and his agents, to restrain them from disputing the validity of the commission, and to restrain the continuance of the actions of ejectment already commenced against the several purchasers, or the commencement of others: and that *Granger* might be ordered to join in confirming the titles to such purchasers, and that he might pay the costs of the petition.

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Mr. *Bethell*, in support of the petition, after stating the above facts, was stopped by the Court.

Mr. *Swanston* and Mr. *Russell*, appeared on behalf of the respondent, the bankrupt, Mr. *H. C. Granger*. The model of this case is no doubt that of *Ex parte Hornby*, in the matter of *Tarleton(a)*, before Lord *Brougham*. But the grounds of our objection to the present petition are threefold. We contend, 1st. That this Court has no jurisdiction to grant an injunction at all; because a bill in equity is necessary for that purpose. 2dly. That before an injunction could be granted by any Court, the assignees must show that there is a *bona fide* commission,—not only that the existing commission stood in law unsuperseded, but that it was a good and valid commission at the time it issued. And 3dly. That in this case there has been no such act of acquiescence on the part of Mr. *Granger*, as will authorize the present application. [Sir *G. Rose*. It will also be necessary for you to consider, how far a purchaser under a commission is bound to show its validity, upon an appli-

(a) Mont. & Bli. 1.

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cation of this nature.] We will take these objections separately; and 1st,—Whether this Court has jurisdiction to grant an injunction on petition? The case of *Ex parte Hornby* (a), where one of the questions was, whether the Court of Chancery would grant the injunction on petition, without bill, can afford little argument in favour of this petition. For there, as may be collected from the judgment (b), that question was abandoned; the objection principally relied on being, whether there was not an active acquiescence under the commission. Notwithstanding that case, therefore, we contend that the Lord Chancellor, before the constitution of this Court, could not, as sitting in bankruptcy alone, grant an injunction, without a bill filed. Though some instances may have occurred where, in bankruptcy, an injunction may have issued on petition only, yet that may be said to have happened, from the two characters of Chancellor and Bankruptcy Judge being united in one and the same person; and there, as the power existed in the individuals either by the one mode or the other, they might have exercised that power on petition only, to avoid the circuitry and delay of filing a bill for that purpose. But this Court, being constituted as a Court to determine matters in bankruptcy alone, cannot exercise so large a jurisdiction as Chancellors may have been wont to do. The jurisdiction in bankruptcy over the subject-matter, in this case, originates with the commission: till that commission came into existence, there could be no jurisdiction at all. In order therefore to the exercise of any of the powers of this Court, it must be shown that the commission is legally good. Whether this commission is so, is a ques-

(a) Mont. & Bli. 1.

(b) *Id.* p. 10.

tion which it is not competent to this Court to try. It is purely a legal question, and must be tried at law. [Sir G. Rose. During the earlier years of my practice in bankruptcy, it certainly was the generally received opinion, that an injunction could not be granted upon petition, but that a bill was, in all cases, necessary for that purpose. But before I retired from the bar, it had become the settled practice in bankruptcy to grant that relief on petition. I was counsel in the case of *Ex parte Hornby*, and though I find, in the report of that case (a), I am set down as counsel for the petitioner, yet my impression is that I was to have argued against it, and was to have contended that the Court had no jurisdiction, except upon bill filed; but I thought the contrary then so well settled, that I did not venture to offer any argument the other way.] We say, that it was only because bankruptcy happened to be administered by the Lord Chancellor, that injunctions ever came to be granted on petition; and though Lord Chancellors might do this as equity judges, yet this Court, having a jurisdiction limited to bankruptcy matters alone, has no such extensive powers as the Lord Chancellor had. It is impossible to contend, that any statute of bankruptcy gave this power of granting injunctions. Lord *Eldon's* final opinion, before he retired from the bench, was, that it could only be done on bill filed. This we gather from *Ex parte Glossop* (b), to which we shall more particularly refer presently. And it will be found, that that case is conclusive on the point, that a bill must be filed; while no decision can be found, which goes so far as to determine positively, that a petition alone is sufficient. To this we may also add,

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(a) Mont. & B. 9.

(b) 2 Gl. & J. 268.

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that, with some occasional exceptions during Lord *Eldon's* chancellorship, it has been the uniform practice since and during the time when Lord *Thurlow* held the seals, not to order an injunction on petition. With regard to the cases upon this subject, *Ex parte Hornby* (a) affords no guide whatever for the judgment of this Court. There the Court were so entirely against the respondent on the merits, that it was manifest that if the petition had been rejected, the very next day a bill might have been filed, on which an injunction would, as of course, have been granted by the very same judge. It was not likely, therefore, that, having his mind so fully satisfied on the merits, he would have sanctioned such an unnecessary expense, unless the respondent had urged it on him very strongly, which from what has fallen from Sir *G. Rose*, and from the report itself, it is manifest the respondent did not. [*Erskine* C. J. You seem to overlook that part of the judgment in that case, where the Lord Chancellor says (b), "The only case conveying the notion that it ought to be by bill, is that of *Ex parte Glossop* (c); and that case seems to be an exception to the general rule; for not only in many cases it has been decided, that the mode of petition is competent, but in two or three, that it is the *only* competent course, and that a proceeding by bill is irregular."] In *Ex parte Warwick* (d) a petition was presented by the lessor of a bankrupt lessee, for payment of rent due after the bankruptcy, and for compensation for hay &c. carried off the premises by the assignees; and it was dismissed, because the Vice-Chancellor thought he had no jurisdiction to grant an injunction, except in the cases mentioned in the 6 G. 4.

(a) *Mont. & Bli.* 1.(b) *Id.* p. 10.(c) 2 *Gl. & J.* 268.(d) *Buck*, 327.

c. 16. s. 75., or where the petition made out a case of waste. The case of *Ex parte Nutt* (a) negatively shows, that the Court would not grant an injunction to restrain an action of trover against the assignees to try the validity of the commission. There Lord *Thurlow* said, "that the act of bankruptcy was plain; but if it had been doubtful, he would not have granted an issue after a year and a half's delay, and other acts of acquiescence; but he observed, that "if the party were really no bankrupt, she was not without remedy, for she may bring an action against the assignees." In *Flower v. Herbert* (b), before Lord *Hardwicke*, a motion was made to stay proceedings in an action against the assignees, and being founded upon a bill filed, the motion was granted. In *Kirkpatrick v. Dennett* (c) a bill was filed; and though certainly the Vice-Chancellor expressed a strong opinion in favour of proceeding by petition only, yet the demurrer in that case was allowed, upon the ground that the bill did not contain allegations sufficient to induce the Court to think there was equity for an injunction. [Sir *J. Cross*. In the case of *Ex parte Grant* (d), which was on petition, Lord *Eldon* issued an injunction to restrain the bankrupt from prosecuting an ejectment commenced after seven years acquiescence. Surely, such a decision ought to govern us on the present occasion. It may be assistant, also, to consider analogous cases. In lunacy, all applications are by petition; yet no one will doubt but that injunctions have often issued, without bills being filed. So again, put the case of an action of trespass commenced against an officer of the Court of Chancery, for an act

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(a) 1 Atk. 101.

(b) 2 Ves. sen. 326.

(c) 1 Sim. & S. 408; 1 Gl. & J. 300.

(d) Buck, 90.

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done in discharge of his duty; the latter Court does not wait for a bill being filed, but at once, on a summary application, restrains the action and tries the right of action itself. In like manner, also, it proceeds in cases of sequestration.] There is no analogy between such cases and the present. If the object there is to try the validity of the sequestration, then the Court of Chancery would not deprive the party aggrieved of his legal remedies, and of his right to try the subject at law. In *Ex parte Glossop* (a) a petition was presented, and there Lord Eldon, after having examined all the cases, said, he was satisfied "that the only remedy was by bill." This case was long subsequent to that of *Ex parte Grant*. So that whatever may have been the practice before that case was decided, it must be attributed to the hasty manner in which bankruptcy business was often got through; and the practice must be considered as reformed by the weightier judgment of Lord Eldon, proved upon a careful review of all the preceding cases. In the case of *Ex parte Leigh* (b), an injunction was indeed issued on petition only; and though the objection now taken was urged in that case, Lord Lyndhurst, who decided it, was not then aware of Lord Eldon's judgment in *Ex parte Glossop*, as it was not then cited; but certain it is, that had Lord Eldon continued Chancellor, a different result would have been arrived at. Upon the whole of the authorities, and upon the weight given to the decisions of the several Judges before whom they have been decided, we contend, that the only way in which an injunction can be properly obtained is by bill. However Chancellors might have awarded this relief on petition alone, the

(a) 2 G. & J. 268.

(b) 2 G. & J. 332.

institution of this tribunal, for the sole purpose of deciding questions in bankruptcy, has given rise to a very different state of circumstances. The jurisdiction in bankruptcy and in equity, for the purpose of granting injunctions, has become separated; and there is nothing in any statute relating to bankruptcy, which confers on this Court the jurisdiction to order injunctions in such cases as the present. Moreover, whatever was the practice prior to the case of *Ex parte Glossop*, it was not till then that the subject was maturely considered; and the matter having been well weighed by such a mind as that of Lord *Eldon*, the decision in that case must now be regarded as the law of the land.

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ERSKINE, C. J.—The only question now before the Court (for we must regard it as a preliminary objection,) is, whether we have jurisdiction to issue an injunction to restrain the bankrupt's proceedings at law. Our jurisdiction is objected to, on the ground that before the constitution of this Court, the Lord Chancellor, sitting in bankruptcy, had no power to issue an injunction, except upon a bill being filed; and therefore, it is contended, neither have we. I regard the main question as one purely and entirely in bankruptcy; and looking at it in this light, it is, to my mind, a matter of surprise, that we should be called on to say we have no jurisdiction. If I found, that the last case before the establishment of this Court, had decided that which the respondent contends for, or that the current of prior authorities were in his favour, I might pause for a moment. But it is not so; the practice has uniformly been the other way, with but one exception; and looking at the words of the 1 & 2 W. 4. c. 56., I find we have power given

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us to determine all such matters in bankruptcy, "as now usually are, or lawfully may be brought by petition, or otherwise, before the Lord Chancellor."

Without going into the question of the power given to us under the words, by petition "or otherwise," it is enough to find we may proceed on petition: and the only question is, whether the Lord Chancellor has usually granted injunctions like the present, upon petition? It is said, that the single case of *Ex parte Glossop* obliges us, upon the present application, to renounce our jurisdiction. Now, whatever weight is to be given to Lord *Eldon's* decisions, (and no man is more inclined to bow to them than myself,) some weight must also be given to the subsequent decisions of Lord *Lyndhurst* (a), Lord *Brougham* (b), and the Vice Chancellor (c). By these learned judges, as well as by Lord *Eldon* at one time, it has been held to be the general current of practice, to award injunctions, in such cases as the present, on petition only. I therefore think we are bound to assert our jurisdiction, and to go into the merits of this case; leaving it to other Courts to restrain us, if they think they have any reason for so doing.

Sir J. Cross.—It is a matter of considerable surprise to me, that on all questions as to our jurisdiction, the fact of the existence, or non-existence, of reported cases strictly analogous, seems to be regarded as decisive upon us. To me, the act of parliament which established this Court, appears to be the right criterion by which we should mainly, if not solely, determine. By the 1 & 2 W. 4. c. 56. we sit here to determine all mat-

(a) *Ex parte Leigh*, *suprà*.(b) *Ex parte Hornby*, *suprà*.(c) *Ex parte Hill*, Mont. 9.

ters in bankruptcy. The question is then, is the present a matter in bankruptcy? It is impossible to give any but an affirmative answer to that question. The parties to this application, are the assignees, and a purchaser under the commission, on the one side, and one of the bankrupts on the other. The subject-matter also is the bankrupt's estate. Such being the case, though there never had been any prior decision on this subject, I consider we ought fearlessly to exercise the jurisdiction now contended for.

There is an old maxim, *Boni judicis est ampliari jurisdictionem*; which is not to be understood as implying, that it is right to extend jurisdiction over matters clearly not within it, but that in doubtful cases the jurisdiction ought to be entertained, in order to prevent the failure of justice. The only exception to this wise maxim is in the case of a tribunal of inferior jurisdiction, such as that of a justice of the peace in penal matters, whose powers the superior Courts always confine to the strict letter of the law. But it would be surrendering the station this Court holds as one of the superior Courts of Westminster Hall, which the act declares it to be, did we seek to limit our jurisdiction in the manner the respondents contend for. If we look to the history of bankruptcy jurisdiction, we shall find, that it has always been thought advisable by the judges to extend it. The earliest instance, in which Chancellors entertained this jurisdiction, is in the reign of *Hen. 8.* Then, power was given to the Lord Chancellor to affix the great seal to commissions; and thence he assumed and exercised jurisdiction and control over the working of those commissions. Next, we find, after a lapse of 100 years, a case before Lord *Nottingham* upon the subject of proof, and there,

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though that judge confessed himself startled by the proposition, he made the order (a). From this time we find it on the increase, till the time of Lord *Eldon*, who in the case of *Ex parte Bradley* (b), makes use of these words, "I am convinced, that it was the intention of the legislature, in giving jurisdiction to the Chancellor in bankruptcy, to give him power to use, in bankruptcy, the authority used in causes in Chancery, where no specific authority is given by the statutes."

In this state of things this Court is constituted; and in order to construe rightly the words of the act, let us look at the manifest intention of the legislature. It says, our jurisdiction is to be exercised "in all matters in bankruptcy," which "now usually are, or lawfully may be brought on by petition, or otherwise, before the Lord Chancellor." It could never therefore be the intention of the legislature, to limit the exercise of our jurisdiction to such cases as can only be borne out by actual decision. We may, under the words "now usually are," do all that Lord Chancellors have been wont to do, although single instances may be shown of a contrary practice. And if decisions are to bind us, we should reasonably refer to the most recent ones, and thereby satisfy the words, "or lawfully may be."—The question then is, has the Lord Chancellor, in a case of this nature, adopted the mode of proceeding by petition, instead of by bill? The Lord Chancellor has exercised his discretion. Sometimes, and in far the greater number of cases, he has allowed the proceeding by petition only to suffice; and sometimes, where he thought it would be better on account of its affording a power of appeal, he has sanctioned a bill. Moreover, the princi-

(a) *Anon.* 1 Ch. Ca. 275.

(b) 1 Rose, 202.

pal object of the legislature was to relieve the Court of Chancery from the burthen of bankruptcy business, and to transfer it all to us. This then being a matter in bankruptcy, I think we are bound to entertain it.

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Sir G. ROSE.—The only question necessary for us now to consider is, what was the state of the practice when this Court was founded; whether, to obtain an injunction, a petition was sufficient, or was a bill required to be filed? If we find the practice has been to pursue the latter course, then it may be obligatory on us to adopt it, and to repudiate the jurisdiction. My own experience assures me, the practice has of late years always been to apply for the remedy by petition: although I confess, my feeling has been in favour of the other mode; and I always have thought that Lord *Eldon's* decision, in *Ex parte Glossop*, was the one that ought to have been followed. The practice, however, has preponderated the other way. If there had been an absence of authority upon this subject, I should feel little disposition to sanction the present application; because (and it is to that to which we must not shut our eyes,) we are assuming a very extensive and a most important branch of jurisdiction,—so much so, that we may be called upon hereafter to issue injunctions to restrain bankrupts from proceeding in any other Court whatever, upon principles arising out of acquiescence and conduct, which, strictly speaking, are applicable in Courts of Equity only. But whatever is my private opinion, we find the practice settled the other way. And when we know, that in *Ex parte Hornby* the Lord Chancellor has so decided it, we should send this case to him with a very ill grace, upon appeal:

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The analogous cases on which the Court of Chancery has issued injunctions on petition only, have been already mentioned; and I need only add, that if, where a creditor's suit has been commenced, any creditor proceeds for his demand at law, the Court, before decree, will, on motion or petition, prevent his continuing his action (a). I should be unwilling, whatever might have been the latent intention of the legislature, to extend our jurisdiction beyond that which, at the time of the institution of this Court, the Lord Chancellor was in the habit of exercising. But in this case, I am clearly of opinion we have the jurisdiction, according to the former practice in bankruptcy. One fair test by which we may try our right is, whether, if we chose to order the injunction, the bankrupt, in case he committed any act in breach of the order, could be committed? Of this I have no doubt; and I feel satisfied that no Court could prohibit our proceeding. We must therefore proceed to hear this case on the merits.

January 16. Upon the merits, Mr. *Bethell*, for the petitioners, was not called to argue the case.

Mr. *Swanston*, and Mr. *Russell*, for the respondents. It is our intention, in arguing the merits of this case, to contend, *secondly*, that before an injunction could be granted by any Court, the assignees must show that there is a *bonâ fide* commission; and *thirdly*, that there has been no such act of acquiescence on the part of Mr. *Granger*, as will authorize the present application.

Secondly, The effect of the adjudication in bankruptcy is, to give to the assignees the legal title in all

(a) And see also the case of *Frowde v. Lawrence*, 1 Jac. & W. 655.

the bankrupt's estate. The title being then purely legal, it is of such a nature, that its validity can only properly be tried at law, if any thing adverse to it is set up. If the assignees seek to prevent a trial at law, on coming into equity, they must make out a strong case of equitable circumstances, evidencing a legal title as the foundation of their proceeding, or else an equitable title superinducing a legal one; otherwise they can derive no relief in equity. It may be likened to the case of a parent's legal right to control his own children, the exercise of which can only be prevented under strong equitable circumstances. Applications for injunctions against the exercise of a legal right, are not willingly listened to by Courts of Equity. Repeated trials and verdicts, in favour of the party seeking the protection of equity, are looked for before an injunction to stay the trials at law of such rights will be issued: and it is not till the proceedings at law against the applicant, amount to vexation, that the Court is inclined to lend its assistance. What equity can the assignees show, in the case before the Court, to the extraordinary relief which they now seek? They will not venture to show that the commission is well founded, nor have there been repeated trials at law, of the validity of the commission, or verdicts in its favour. And it must appear strange, that the present petition is attempted to be sustained, where there have been but two trials at law as to the validity of the commission; one of which was decided in favour of it, upon a plea merely of the statute of limitations,—and in the other, the assignee failed to establish it. It is hardly possible to conceive any equitable circumstances, that should entitle the assignees to apply to restrain

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the bankrupt's right of trying at law the validity of this commission against him.

Thirdly, With regard to the degree of acquiescence under this commission by the bankrupt, in no case has an injunction issued, except where active acquiescence and positive interference have been shown. In *Ex parte Grant (a)*, the bankrupt was employed by the assignees, as their agent, to sell the property, and he accordingly found a purchaser. The purchase money for the estate was paid, and a dividend made of it. Afterwards the bankrupt commenced an action in ejectment against the purchaser, pretending he had lately discovered he was not a trader; that was seven years after the commission. In evidence it appeared, he had offered to abandon the action, if he were paid by the assignees for so doing: under these circumstances of active interference, the proceedings at law were restrained. In *Ex parte Bryant (b)*, the Lord Chancellor says, that "if a bankrupt has failed in a single action, the Court will not prevent him from bringing another." And in a subsequent report of the same case (c), the Lord Chancellor observed, "There is no instance of this Court injoining a bankrupt from trying his bankruptcy more than once, or, in other words, of quieting the assignees, and other persons entitled under the commission, until his attempts to supersede it become so vexatious from their frequency, that it is fit by the power of the Court to put an end to such proceedings." In *Kirkpatrick v. Dennett (d)*, the bill to restrain the bankrupt from proceeding at law, was attempted to be

(a) Back, 90.

(b) 1 Ves. & B. 211; S. C. 2 Rose, 1.

(c) 1 V. & B. 606.

(d) 1 Sim. & Stu. 408; S. C. 1 Gl. & J. 300.

sustained, by showing he had obtained his certificate. But on the ground that that was not a sufficient acquiescence, the Vice-Chancellor allowed a demurrer to the bill. [Sir J. Cross. The Lord Chancellor would not try the validity of a commission, where a fair doubt was raised against it. But whatever were the events of the trial at law, the Court of Chancery has never considered itself as bound, though it directed the issue on the action to be brought, but, if it felt itself dissatisfied, would go on directing other trials to be had. This may be particularly exemplified by the case of *Lansdowne v. Lansdowne* (a). This Court, however, is by the legislature constituted expressly as a Court of Law and Equity, and therefore surely it is empowered to try such questions itself, if it thinks it is proper so to do.] That is the very thing we are contending against, and we seek to show that it is only under very strong circumstances of acquiescence, and active interference under the commission, that the Court will deprive the bankrupt of his legal right. In *Ex parte Hornby* (b), after various proceedings, an agreement for a compromise was entered into, by the bankrupt's son, on behalf of his father, with the assignees; and to urge on the compromise, an action was brought, under which a verdict was obtained by consent against the bankrupt, upon the terms of the proposed arrangement; and there were other acts of acquiescence on the part of the bankrupt. And there the Lord Chancellor, drawing a distinction between active and passive acquiescence, regarded his acts as amounting to mere passive acquiescence, and says, that if the case had rested

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(a) 2 Bligh, 595

(b) Mont. & Bligh, 1.

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simply upon the fact of acquiescence, he doubted whether he should have made the order. In that case also, besides what appears from the printed report, there were other acts of acquiescence. The bankrupt, knowing of the commission against him, continued, for a period of sixteen or seventeen years, to reside in France; and though in constant communication with a party in England, he never took any step to upset his commission. In 1815, indeed, a petition was presented by the bankrupt's son to supersede it, and an issue was directed, and was tried at Guildhall. The bankrupt was examined *vivâ voce*, and a verdict was found in favour of the commission. A new trial was then applied for; but so well satisfied was Lord *Eldon*, who directed the issue, with the acquiescence on the part of the bankrupt, that he refused to direct it; and the commission was thereupon established. In *Ex parte Cutten (a)*, the Vice-Chancellor, in his judgment, says, "The difference between this case and *Ex parte Kirk*, and which takes the present entirely out of the principle of that case, is, that in *Ex parte Kirk* there was only delay and passive acquiescence on the part of the bankrupt; here there has been active co-operation on the part of the bankrupt. For delay alone, this Court merely refuses to interfere, before a trial establishing his legal rights. In the present case the bankrupt's active interference with the administration of his estate amounted to a pledge to his assignees that he would not attempt to disturb the commission; and of such concurrence there is abundant evidence in his having executed deeds, and taken measures to obtain his certificate." In *Ex parte Hill (b)*

(a) 1 Gl. & J. 317.

(b) Mont. 9.

the acts of acquiescence relied on were, the bankrupt's having applied for his protection, and having agreed with the assignees to purchase his estates, of which they were possessed as assignees: and these the Vice-Chancellor did not think sufficient to warrant him to restrain the bankrupt.

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As to the length of time during which the bankrupt has lain by, this Court cannot estimate that as amounting to an acquiescence sufficient to warrant the result the petitioners would arrive at. If a party having an equitable title to relief comes into equity, and it is objected that length of time shall run against him, it is one thing; and the Court will justly inquire, "why not have come sooner," and will leave him to his legal remedies. But where another party comes into equity, seeking to restrain this exercise of a legal right, on the ground of lapse of time, Courts of Equity will not listen to such objections, unless it is a sufficient bar at once to the legal right, which in this case it is not. It holds good only against the party seeking relief, and not against him who is dragged into the Court (a). Finally, we contend that, even if passive acquiescence were sufficient, it has not existed in the present case: for, looking at the facts of this case, there has been throughout a most decided opposition in every way shown towards it on the part of Mr. Granger.

Mr. Bethell, in reply, was stopped by the Court.

ERSKINE, C. J.—If there were no other party whose

(a) Sir G. Ross referred to a case of *Ex parte Murdock* upon this point, decided, as he thought, by Lord Brougham; but we are unable to find any report of that case.

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interests were to be looked to upon the present occasion, than the bankrupt himself, it would become a serious question, whether we should not be denying him the most merciful justice, if we refused to afford to the petitioners the relief they pray adversely to him. But besides the bankrupt, there are other persons brought before the Court on this occasion, whom it is the duty, as well as the inclination, of this Court to protect. There are the assignees, whom, as the officers of the Court, it is the first principle of equity to shelter from improvident litigation; and there is an innocent purchaser, whose estate having been sold to him under the proceedings of this Court, it becomes imperative on the Court to quiet his title, by putting an end to the harass which the bankrupt's unjust proceedings must otherwise cause him. It is on these grounds, that we are called upon and are proceeding to act.

In the case before us, look for a moment at these simple facts. The assignees have been appointed ever since the year 1812; and, till the year 1832, no active steps are taken by the bankrupt to dispute fairly the validity of this commission, under which so much has been done, and so many fresh rights have accrued, in the administration of the estate.

The legislature has not, it is true, thought proper to prescribe any limits to the legal right of bankrupts to try the validity of their commissions; but lord chancellors have long interfered to prevent the vexatious exercise of that right, and have done so, after a lapse of time even short of that adopted in the statute of limitations. But it is said, that it has never been done in a case like the present, and only where there has been active co-operation with the commission, or where there have

been repeated decisions against the bankrupt; and it is urged, that mere passive acquiescence is not sufficient. It is further contended, that there has not been passive acquiescence on the part of this bankrupt, even if that could be held sufficient to bind him. I admit, that no case of active co-operation has been made out against him; neither have there been numerous decisions establishing the validity of the commission. In fact, the legal proceedings that have taken place under this commission, by the one party or the other, amount to little or nothing either way. The result of the petition by the assignees in 1813 against the creditor, although it ended in a nonsuit, from the inability of the assignees to sustain the proof of the commission, was nothing. The nonsuit arose purely from accident; and a new trial was moved for and obtained, although the result of that does not now appear to be known. That only establishes that the commission was not well made out by evidence, and that it was a bad and invalid commission. The action commenced by the bankrupt in 1824 ended indeed likewise in a nonsuit; but there the statute of limitations was pleaded against the bankrupt's alleged cause of action, and it prevailed; yet the validity of the commission was not tried. The bankrupt's petition to supersede, in 1832, was also dismissed with costs, and on the ground of acquiescence. But though that acquiescence was sufficient to induce this Court to come to such a decision upon that petition, it would be going much farther, to hold it a sufficient ground to warrant our restraining his exercise of a legal right. This tallies with that which fell from Lord *Brougham* in *Ex parte Hornby*. But at the same time his lordship never intended to

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imply, that mere passive acquiescence might not be sufficient, or that in a strong case (which the present surely is) he would not interfere; otherwise this manifest absurdity and injustice would arise, that if the bankrupt chose to lie by till the original assignees, and the other parties necessary to prove and support the commission, were dead—till all the evidence upon that subject were lost—he might then step forward with almost a certainty of success. The foregoing proceedings, to which I have just alluded, establish nothing of itself conclusive; but they naturally lead one to make this inquiry—why did not the bankrupt, from the commencement, come forward and contest this commission with the assignees, in an action of ejectment? It cannot be alleged, that he had no funds for that purpose; for he had sufficient to squander upon the frivolous action of 1824: besides, he might, had he thought it wise to do so, then or at any time have sued in *forma pauperis*. Neither does it appear that he has been ignorant of the alleged grounds of the invalidity of the commission; for, from the beginning, he has alleged the commission to have been fraudulent against him; and every circumstance attending it, of which he would now avail himself, has been within his knowledge, throughout the whole lapse of time that has occurred. This is not a case, also, in which the assignees have done nothing under the commission, and the bankrupt has thereby been lulled into inactivity. They have taken active steps to sell all the estate, and to wind up the bankrupt's affairs; but, with all this, Mr. *Granger* has never interfered adversely to supersede the commission. If this Court were to encourage such conduct on his part,—if it were to suffer the ripping up of all

the transactions, of all the sales that have taken place, it would commit, in my opinion, an act of gross injustice. I therefore think we are bound to interfere to prevent his harassing all the several parties, and at a great expense, perhaps out of their own pockets, by any further proceedings at law; especially after the lapse of twenty-two years since the issuing of the commission.

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Sir J. CROSS.—Very important questions are involved in the second and third points, which have been argued before us this day. It has been incidentally argued, that this Court is not competent to decide on the validity of a fiat; and it is said, that in the formation of this Court, there is no jurisdiction to do so. At the present moment, this seems to me a most extraordinary doctrine; and it is not suggested what other Court can entertain the question. If we direct an issue, we are not bound by its result, unless we approve of it; and surely, as we are constituted, we may try the issue ourselves. In the Ecclesiastical Court alone subsists the jurisdiction to try the validity of a will; and though a Court of Law may determine against its validity, yet the will will stand good, until the Ecclesiastical Court sets it aside. In my opinion, this is the only proper Court to try the validity of a fiat; and I should wish the bar to consider, whether, if a petition to supersede a fiat be presented to be fairly tried and decided on the merits by this Court, such decision is not binding and conclusive. In the present case, I cannot regard the commission as otherwise than valid; and that which seems to me the best evidence of that fact is, that it has stood the test of

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twenty-two years against the attempts and desire of an adverse bankrupt to upset it. I should say the lapse of time is alone sufficient to make it so; for after twenty years a bond is presumed to have been satisfied, and it would be well if some fixed limit were acted upon in these cases in bankruptcy. This commission issued about twenty-two years ago. In the first year the bankrupt *Granger* came forward, and declared the commission to have been fraudulently issued against him, and alleged himself to be perfectly solvent. Had that been the case, he might, in the very first year, have petitioned to supersede it; instead, however, of doing so, he prays an extension of the time for his surrender. I am aware this cannot be taken, of itself, as concluding his right; but it affords some evidence to guide our decision at this distance of time. He then neglects to surrender himself, and is committed, and lies in prison for not doing so, for the space of seven years. Notwithstanding this, he brings no action for false imprisonment, but quietly lies there until he is discharged, under the notion that his contumacy proceeded from the imbecility of his mind. What does he next? In 1824 he brings an action of trover against Mr. *George* for a box, in which he is nonsuited on the plea of the statute of limitations. Had he really believed the commission invalid, why did he not bring his action for false imprisonment? The statute of limitations would not have been pleadable in bar to that form of action; and yet it would have tried the validity of the bankruptcy much more effectually, and would have been the much more natural course for him to have adopted. Still he acquiesces, till just about twenty years have expired. Then he tries a petition

to supersede in this Court. In that he fails, and is ordered to pay the costs. This he neglects, and regardless thereof, he proceeds to bring eleven actions of ejectment against purchasers! One would naturally infer he did this under privilege as a pauper; but no such thing, he has funds sufficient thus to harass eleven persons, while one action against the assignees would have tried all he required to be tried. This is most probably carried on at the expense of property which ought to belong to his creditors; and it amounts, in my mind, to the grossest vexation on his part, while all this time he is in contempt of this Court, by the non-payment of the costs of the petition to supersede. A great stress has been laid in the argument on the difference between active interference, and passive acquiescence. It seems to me to be a distinction without a difference, in a case such as this is. Acquiescence may be active or passive; but of the latter description the longer the time is, the stronger is the inference of acquiescence. Looking at all the facts of this case, and particularly to that of the petition to enlarge the time for surrender, and the laying so long in prison, I incline to think it amounts to much more than passive acquiescence. At all events, if this Court should hold it has no power to interfere, a gross failure of justice would ensue. I therefore concur with the Chief Judge, that we are bound to put a stop to these proceedings on the part of the bankrupt.

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Sir G. ROSE.—I am surprised to hear it attempted to be gravely argued, that the length of time does not warrant our interference on the present petition. The affirmative of the question of our exercising our jurisdic-

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tion might be sustained, either on the ground of the length of time that has elapsed, or on the ground of the bankrupt's acquiescence, or the due protection we are bound to afford to the assignees as officers of this Court, and to purchasers under its orders. If the bankrupt had brought an action against the assignees, fairly tending to try the validity of the commission, we might not have been inclined to interfere. But even supposing he had taken that step, (that being the only road by which he could travel to this Court for a supersedeas,) and, being successful in his action, had petitioned here for a supersedeas, it by no means follows that he would have succeeded on that petition, where it appeared that the petitioning creditor, the original assignees, and two of the bankrupts, who had obtained their certificates, and all of whom might have supported the commission by their testimony, were dead; and where there were numerous purchasers under the commission, whose titles must at all events be confirmed. As to the petition of 1832, if upon that occasion the Court had been aware that eleven actions of ejectment against purchasers were pending, it would, before opening his petition, have compelled the bankrupt to elect, and to abandon those actions, if he chose to proceed with his petition. And we must now regard him as having made his election to abide by the result of that petition. Again, two of the bankrupts under this commission appear to have gained their certificates. But the petitioner might long ago, and prior thereto, have come here to supersede, without the others joining with him. Yet let me ask how, in fairness, can Mr. Granger now come here, to recover back that property, the division of which, perhaps, formed the chief

inducements to the creditors to release the other bankrupts, by the signature of their certificates? Again, let me suggest, as I do not wish to express a decided opinion upon it, if this commission were now to be superseded, could the creditors, who have come in under it, sue the bankrupt at law for their original debts? Or would they not be barred by the statute of limitations? (a) Upon all these grounds, I think that the injunction sought should be issued, to restrain the present actions, as well as to prevent any future ones, from being commenced.

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The Court made the following Order:—That as against the said *Henry Clarke Granger*, and all persons claiming under him, the commission is well established. And upon payment by the petitioners to *Henry Clarke Granger* of the taxed costs of the action brought by him against the petitioner, *Henry Munn*, and incurred previously to the time of this petition being served upon him, this Court doth order that *Henry Clarke Granger* do discontinue such last-mentioned action. And it is ordered, that *Henry Clarke Granger* be restrained, upon payment of his costs already

(a) There is little doubt but that this objection would not hold good. In many cases, under various circumstances, it has been held in equity, that where a legal bar arises from the pendency of a suit, the Court would prevent such bar being set up at law against the claim. See several cases collected in 2 Chit. Eq. Index, p. 1473, Appendix, 1st edition, under title "Equitable Relief prevented by Act of Court," and under title "Injuries arising by Acts of the Court," in the body of 2d edition. The same principle would, it should seem, apply, where a commission is superseded after six years have elapsed from its date. See particularly *Sirdefield v. Price*, 2 Young & J. 73. S. P. Anon. 1 Vern. 74. E. C.

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incurred in all other pending actions respectively, from proceeding in such actions, and that in like manner he discontinue the same. And it is further ordered, that *Henry Clarke Granger* be, and he is hereby restrained from commencing or prosecuting any other action against the said assignees, or any person or persons deriving title from them or under the commission. And it is lastly ordered, that the costs of the respondents, the assignees, of the former petition of *Henry Clarke Granger*, dismissed by this Court, be set off and allowed as against the bankrupt's costs of his action against *Henry Munn*.

Westminster,
Jan. 27 & 28.

Ex parte WESTALL.—In the matter of FLETCHER.

Where the time for opening a fiat expires, and a second is then issued by another party, it is no ground for superseding the second, that it did not issue until after the first was actually opened, unless the party issuing the second knew that fact, or was guilty of some fraud.

A Fiat in this case had been taken out against the above bankrupt on the 24th of December last, the time for opening which expired on the 21st of January. That time had gone by, and another party had taken out a second fiat on the 24th of January; the proceedings on which, the party issuing the first fiat now moved to stay.

Mr. Koe in support of the motion. The second fiat in this case was not issued till the 24th of January; but it appears, that though the time for opening the first fiat had expired on the 21st, the petitioning creditor afterwards proceeded with it, and the adjudication was made on the 23d of January, the day before the second

fiat was issued; and that the order to rescind the first fiat was not made until the 25th January. Although the first fiat was supersedeable on the 21st, it was in fact opened before it was actually superseded. Under these circumstances, the Court perhaps will think fit to rescind the order of the 25th instant; and, superseding the second fiat, allow the first to be proceeded with.

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Mr. *Swanston*, *contra*.

Sir GEORGE ROSE.—Unless you can show, that the party issuing the second fiat knew that the first was in prosecution, or was guilty of some fraud (*a*) in taking out the second fiat, we cannot grant this application; the issuing the second fiat was otherwise a matter of legal right (*b*).

Motion refused.

(*a*) See *Ex parte Baker*, 2 Dea. & Ch. 362.

(*b*) See the Gen. Ord. 26 June 1793, 2 Deac. B. L. 85.

Ex parte JOHN LAWRENCE HINTON.—In the matter
of JOHN LAWRENCE HINTON.

Westminster,
January 28.

THIS was a petition to supersede a commission under the 6 G. 4. c. 16. ss. 133, 134.

Where the bankrupt petitioned for a supersedeas, under the composition contract clause in the 6 G. 4. c. 16., and the Commissioner had certified that all the requisites of the statute

Mr. *Teed*, for the petition, stated that the objection made in the office was, that the Commissioner had not certified according to the strict form required by

had been complied with, and stated the amount of the debts proved to the amount of 20l., the number of the creditors who had proved, and the number and value of the creditors who consented, the Court made the order, notwithstanding the Commissioners had omitted to state precisely the exact fractional proportion, under Lord *Eldon*'s General Order.

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the General Order of Lord *Eldon*, dated 27th June 1826 (a).

The Commissioner's certificate, after reciting the 133d and 134th sections of the 6 G. 4. proceeded as follows:—" And we do further humbly certify to your Honors, that the creditors, who have proved under the said commission debts to the amount of 20*l.* and upwards, are thirty-six in number, and that the whole amount of the debts proved by them is 5672*l.* 2*s.* 6*d.* And we further certify, that by the examination of witnesses, and other good proof thereof, it appears to us, that on the 25th day of October last, at a meeting of the creditors of the said *John Lawrence Hinton* who had proved their debts under the said commission,

(a) 2 Gl. & J. xiv. This order, after reciting the 133d and 134th sections of the 6 G. 4. c. 16. proceeds as follows:—" But there is not any provision in the said act directing the manner of holding such meetings, or in which evidence shall be given of the performance of the several particulars before mentioned, I do therefore hereby order, that at the first of the said meetings a minute shall be taken by the solicitor of the assignees, of the names of the several creditors present, and the amount of their several debts standing in proof upon the proceedings, distinguishing such of them as shall assent to such composition. And I do order, that the second of the said meetings shall be held at a meeting of the Commissioners named in each respective commission, and that at such meeting the said Commissioners do, by deposition of witnesses and documentary evidence, as to them shall appear to be proper, inquire and ascertain whether the several particulars, directed by the said act to be performed previous to the holding of such second meeting, have been duly performed, and certify the same to the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, together with the proceedings which have taken place at such second meeting. And for the further information of all parties interested, I do hereby further order, that the said Commissioners do state in such certificate, *what proportion*, in number and value, the creditors assenting to such composition bear to the creditors who shall have proved debts to the amount of 20*l.* and upwards under the commission; and also whether any sale has been made of the bankrupt's estate, in order that provision may, if expedient, be made for confirming the same."

duly held at Whiddon's Royal Hotel, Plymouth, in pursuance of notice in the London Gazette for that purpose duly given, it was agreed by nine-tenths in number and value of such creditors then and there present, such number being reckoned according to the provisions and ordinances of the said act of parliament, (and being two creditors who had proved debts under the said commission to the amount of 269*l.* 12*s.* 9*d.*) that an offer of composition of 1*s.* in the pound upon the debts of the said bankrupt, then and there made by him, to be secured by the promissory notes of the said *John Lawrence Hinton*, payable on the 28th day of January then next, should be accepted. And that we, being informed thereof, did thereupon appoint another meeting of such creditors, to be holden on the 21st day of December last at Whiddon's Royal Hotel aforesaid before us, whereof and of the purport whereof we caused due notice to be given in the London Gazette, and at which meeting nine-tenths in number and value of such creditors then and there present, such number being reckoned according to the provisions and ordinances of the said act of parliament, (and being three other creditors who had proved debts under the said commission to the amount altogether of 302*l.* 12*s.* 10*d.*) by writing under their hands did also agree to accept such offer. And we do further humbly certify to your Honors, that the provisions and ordinances of the said act of parliament, and of the General Order of the 27th day of June 1826, respectively, have been in every respect complied with. And we further certify, that the said bankrupt had no real estate, and that all his personal estate hath been sold and disposed of by the assignees under the said commission; and

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that all the said bankrupt's estate and effects, possessed or received by them, or for their use, after paying the expenses of the said commission, have been divided amongst the creditors who have proved debts thereunder."

Now, although the form required by the General Order may not have been strictly adopted,—the fractional proportion in number and value of creditors assenting, and of those who have proved, not being stated in the certificate,—yet it is manifest, that the spirit of the order is complied with upon the face of the certificate.

The COURT presumed that the Commissioner had certified rightly, that all the requisites had been complied with, and thereupon

Granted the petition.

*Southampton
Buildings,
February 19.*

Ex parte CARBIS.—In the matter of CROGGON.

A party, to whom the bankrupt had assigned a policy of assurance, sends an agent to the office for the purpose of paying the annual premium, who in the course of conversation with one of the clerks in the office, tells him of the policy having been so assigned. Held, that this was not sufficient notice to the insurance office.

THIS was a petition, praying that the petitioner might be declared entitled to the benefit of a policy of insurance, which had been assigned to him by the bankrupt: and the only point was, whether a sufficient notice of the assignment had been given at the insurance office. It appeared that the petitioner, after the assignment, had sent an agent to the office for the purpose of paying the annual premium, who, in the course of conversation with one of the clerks of the establishment on that occasion, told him that the bankrupt had assigned the policy to the petitioner. It did not appear that this was intended, at the time, as notice to the office.

Mr. *Swanston*, and Mr. *K. Parker*, for the petitioners. In *Ex parte Stright* (a), Sir *G. Rose* says, "The Courts have held the least circumstance, in point of notice, sufficient." In that case, also, it did not appear that the object of the letter, which was relied on as evidence of notice, was written with the intention of giving notice; but it was written merely to inquire the value of the policies.

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Mr. *Montagu*, for the assignees. There is no doubt of the law; and the question is, was a sufficient notice given? In *Ex parte Monro* (b), the principles which govern cases of this kind are pointed out. An absolute and direct notice is required; not merely such as may be gathered from loose conversation, which a party in the situation of this clerk would not think it necessary to report to his principals; but it should be such as he would feel himself called upon to lay before them. It might be a question, whether verbal notice is in any case sufficient, but at all events it must be distinct and direct, and it must be intended as notice. It is very true, that in *Ex parte Stright*, the object of the writer of the letter might not have been to give notice; but it was a notice in direct terms, "I am the holder of the policies." Of this the office was bound to take cognizance; and it is very different from what transpired in the case now before the Court.

Mr. *Swanston*, in reply. In *Ex parte Stright*, the Court did no more than support the ordinary equitable doctrine as to notice; namely, that any thing which is

(a) 2 Dea. & Chit. 315.

(b) Buck, 300.

1834. sufficient to put the other party on his guard, is available as notice. In a case like this, affected as the office was by such a notice, no conveyancer could advise that an adverse title could be taken. In *Smith v. Smith*(a) A. made advances to B., a trader, and afterwards took from him as security an assignment of an equitable life interest in stock &c., vested in trustees. Subsequently to the assignment, A. in conversation with one of the trustees who was not the acting trustee, and not with a view to giving validity to his security, mentioned that his debt was secured by the assignment; and that was held sufficient notice to prevent B.'s interest from passing to his assignees in bankruptcy. Lord *Lyndhurst* there says, "we think that the purpose for which notice is given, if notice were in fact given, is immaterial."

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ERSKINE, C. J.—In considering what is notice, arising out of a mere ordinary conversation, we must look to the purpose for which such conversation was held, in order to guide us in determining on its sufficiency. Here the fact of the assignment drops out in mere common conversation between the agent and the clerk. The latter is not requested to communicate it to his principals in the office; nor does sufficient take place on the subject to induce him to do so, and scarcely sufficient to cause the retention of it on his memory. This, in my opinion, is too loose, to induce us to declare it a sufficient notice. In *Smith v. Smith*, the only question was, whether the fact of the assignment was sufficiently brought within the personal knowledge of the trustee. But here the question is, whether such a

(a) 2 Crompt. & Mees. 231.

mode of communication to the clerk was a sufficient notice to the office.

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Ex parte
CARBIS.

Sir J. CROSS.—The question here is, whether notice was given to the office? That, which it is contended was notice to the office, was, we find, nothing but loose conversation between the agent and the clerk, which happened to take place in the office when the former went there to pay the annual premium; but otherwise the communication might as well have been made in the street, or in any other place. If a man walks into a banking house, and accidentally says, such and such a bill, of which the bankers are indorsers, is dishonoured, can it be contended that such would be a sufficient notice to them of the fact? But it is said, that the communication thus made to the clerk was notice to the whole office. It might as well be contended, that notice to the servant of a trustee would be binding on the trustee himself.

Sir G. ROSE.—I concur in the opinion, that this notice is altogether insufficient. As to the doctrine of notice in equity, that depends on principles quite different from those adopted in bankruptcy cases of this description. Thus the notice to purchasers, however slight, if it be sufficient to put them on their guard, is sufficient. Here, in case of the assignment of a chose in action, although it is not necessary that any formal, or even, I think, written notice should be given, yet whatever manner is adopted, it must be a clear and distinct notice.

The petition was ultimately dismissed, with costs.

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Southampton
Buildings,
March 5, 15.

Where the bankrupt petitions for a supersedeas, with the consent of creditors, and it appears that the Commissioners have adjourned his last examination *sine die*, the Court will not supersede, without knowing the reason of such adjournment.

Ex parte GUDGE.—In the matter of GUDGE.

THIS was a petition by the bankrupt to supersede, with the consent of all the creditors who had proved, 20s. in the pound having been paid,—as appeared by the certificate of the Commissioner to whom the commission had been transferred. The commission issued on the 23d May 1831; and it appeared that the bankrupt was willing, but was too ill, to surrender upon the forty-second day. Several adjournments took place for the same reason; and at last the Commissioner adjourned his examination *sine die*, because the bankrupt was not ready with his accounts.

Mr. *Montagu*, for the petitioner. In *Ex parte Norcutt* (a) there had been an adjournment *sine die*; but nevertheless the prayer of that petition, which was precisely similar to the present, was granted; and it seems to be quite a matter of course, even if the bankrupt were in custody upon such adjournment, to supersede where all the creditors consented (b). In this case, there has been no commitment. The bankrupt is ready to confirm all acts done under the commission, as was required in *Ex parte Brown* (c).

ERSKINE, C. J.—I am not inclined to supersede this commission at the present instant, until I know the cause of the adjournment *sine die*. If it has originated in any unsatisfactory answers being given by the bank-

(a) Mont. 281.

(b) *Ex parte Brown*, 2 Swan, 290; *Ex parte Magennis*, 18 Ves. 289; 1 Rose, 60, S. C.

(c) *Suprà*.

rupt, that would amount to a contempt of the Great Seal, which I am not prepared to say the consent of creditors could purge. The petition had better stand over, till the cause of the adjournment be certified to us by the Commissioner to whom this commission stands transferred.

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 Ex parte
Gunge.

Sir G. ROSE.—Unless the bankrupt has passed his last examination, it is contrary to the policy of the bankrupt laws, to grant an application to supersede, on the consent of creditors who have proved; since the last examination, if passed, might disclose other creditors who might oppose this application. In *Ex parte Norcutt* (a), the attention of the Court does not appear to have been called to the fact of the adjournment *sine die*: an objection was taken at the bankrupt office, that the bankrupt had not surrendered; but upon the Commissioner's certifying that he had done so, the supersedeas was ordered. As to the case of *Ex parte Magennis* (b), there the bankrupt came, not with the consent of his creditors, nor acknowledging the validity of the commission against him, but disputing it. He established its invalidity; and then, of course, all that had been done under it fell to the ground, and as a matter of right the commission was superseded. Here the bankrupt comes for a supersedeas as a favour; and I, at present, think we ought at least to know the reason of the adjournment *sine die*, before we grant it to him.

On this day the proceedings being produced, and the grounds of the adjournment having been satisfactorily explained, the COURT ordered the supersedeas as prayed.

March 15.

(a) *Suprà*.(b) *Suprà*.

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March 5.

On the sale of the bankrupt's mortgaged property, the Court, in the order for leave to bid, will not direct that the mortgagee shall not be required to make any deposit.

Ex parte TATHAM.—In the matter of **SHEPPARD.**

THIS was a petition by a mortgagee of the property of the bankrupt about to be sold, for leave to bid, and prayed that, in regard to his character as mortgagee, he might not be required to make any deposit, if he should be declared the highest bidder.

Mr. Phillimore, for the petitioner.

Mr. Ayrton, for the assignees, submitted to any order the Court should think fit to make.

The COURT refused to make any order as to the deposit, stating that a similar application had been refused by this Court before, but made the usual order as to liberty to bid.

*Before the Lord
Chancellor.*

March 25 & 27.

Under a commission prior to the 1 & 2 W. 4. c. 56., where an assignee is removed since that act, it is not necessary that there should be a new assignment, or that the prior assignment should be vacated.

SMITH v. DE TASTET.

THIS was an appeal from a decision of the Vice-Chancellor. A commission issued against *Elisée*, and *Le Taverner* and *Rubichon* were chosen assignees, to whom the usual assignment under the 6 G. 4. c. 16. was made. *Le Taverner* died, and *Rubichon* was discharged; and the plaintiff *Smith* was appointed sole assignee in his stead, under an order of the Court of Review. A bill stating these facts was filed by *Smith*, as assignee, against the defendant, charging that a legacy, which had been given to the bankrupt, had been assigned by him to the defendant subsequent to.

notice of an act of bankruptcy, and therefore praying that the assignment might be set aside.

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To this bill the defendant demurred, on the ground that no assignment under the bankruptcy had been made to the plaintiff, the new assignee, and that the original assignment to *Le Taverner* and *Rubichon* had not been vacated, and that, therefore, as the bankrupt's estate was by law still vested in *Rubichon*, as surviving assignee, he was a necessary party to the suit.

The Vice-Chancellor allowed this demurrer.

Mr. *Solicitor-General*, Mr. *Treslove*, and Mr. *Evans*, March 25, for the appellant, *Smith*, relied on *Ex parte Farlar* (a).

Mr. *Rolfe*, and Mr. *Koe*, for the respondent (b).

LORD BROUGHAM.—This was an appeal from a decision of the Vice-Chancellor, allowing a demurrer for want of parties. The alleged defect in the suit is, that *Rubichon*, the original assignee under the commission against *Elisée*, was not made a party. Now, *Rubichon* was regularly dismissed under the authority of the 1 & 2 Will. 4. c. 56., by an order of the Court of Review, and the plaintiff *Smith* was duly chosen and appointed a new assignee. But as the bankruptcy existed long before that act passed, it is contended that the 25th section does not apply to this case. If *Rubichon* was divested of the interest in the estate, as assignee, it is clear there was no occasion for making him a party; and I have no doubt that he was, and

March 27.

(a) 1 Dea. & Ch. 32; nom. *Ex parte Foster*, Mont. & Bli. 87.

(b) I was not present during the argument.—F. C.

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that the whole interest was vested in *Smith*, by operation of law, so as to render any assignment from *Rubichon* to *Smith* unnecessary. It was therefore unnecessary that *Rubichon* should be a party to this suit. In support of the demurrer it is said, first, that the 25th section of 1 & 2 Will. 4. c. 56. only vests in the assignees, by the earlier branch of that section, all the estate and effects which the Commissioners, "by the laws now" (that is, at the date of the act,) "in force," might assign; and that by those laws, then in force, an order of Court was required to transfer the property; which it is confessed was not obtained in the present case. But that is not the sound construction; the plain meaning of the words in the branch of the clause "all the estate which may be assigned by the Commissioners," being "all that falls under their power as Commissioners," in whatever way the assignment is to be made by them. It may even mean that, if there be any thing to be done for the purpose of transferring, by means of an order of the Court; but there is no occasion for resorting to this supposition. The words are general, and yet in the assignees, without any assignment, whatever an assignment could, as the law before stood, have carried. The object of the provision is to supersede the necessity of any assignment.

Secondly, it is said that the second branch of the clause, by the use of the word "such" as a word of reference, applies to assignees to be appointed in future; and not to those already appointed, as *Rubichon* was. But I am of opinion, that the words "such assignees" mean, only, to avoid the repetition of the expression immediately before employed, namely, "as-

signee or assignees for the time being." It appears to be manifest, that this second branch of the section transfers all interest from the assignee dying or removed to the new assignee; and that its object is to avoid the necessity of any act being done, beyond the appointment of a new assignee. The transfer is made to depend on, and flow immediately from, that appointment: "as often as any such assignees shall die or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee, shall, by virtue of such appointment, vest in the new assignee, without any deed of assignment for that purpose." This construction has apparently been adopted by the Court of Review, and their practice is to refuse the order, which the decision of the Vice-Chancellor in this case would render necessary. *Ex parte Forster* (a) was a petition presented to their Honors, praying an order vacating the assignment to an assignee who had absconded; and it was contended, as here, that the act contemplated future fiats only. But their Honors refused to vacate the assignment, holding it unnecessary, and that the new choice was alone sufficient. There is undoubtedly great weight due to this construction given to the section, and acted upon by the Court of Review. That it is also a construction recommended by considerations of manifest convenience, needs hardly to be added.

In disposing of this case upon the construction of the act merely, I give no opinion on the other question, viz. whether supposing *Rubichon's* interest, as

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(a) 1 Mont. & Bli. 87; S. C. 1 Dea. & Ch. 32. Correctly *Ex parte Farlar*.

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assignee, had not been divested by operation of law, it would have been a ground of demurrer that he had not been made a party. The necessity for considering that point would only have arisen, in case I had concurred in opinion with his Honor on the other point.

The Vice-Chancellor's judgment was reversed,
 and the demurrer overruled.

Ex parte DALY, re DALY.

April 16.
 A notice to produce the proceedings must be served on the assignees, not on the bankrupt.

THIS case is reported, *ante*, vol. iii. p. 728; but it is omitted to be there noticed, that a party had served a notice, to produce the proceedings, on the bankrupt, instead of the assignees. This the Court declared to be an improper service.

Ex parte ANN COLLIER.—In the matter of ROBERT COLLIER, and HORATIO COLLIER.

April 17.
 A petitioner, claiming a portion of the bankrupt's property, has no right to call for the production of a case stated by the assignees for counsel's opinion, for the purpose of showing that the bankrupt has prevaricated in his statements.

IN this case a claim was set up by the petitioner to certain fixtures, on the ground that they were the property of *Robert Collier*, and did not belong to the firm; and a question arose as to the right of the petitioner in bankruptcy to have a case, which had been stated for counsel's opinion by the assignees, produced as evidence, in order to show that *Horatio Collier* had prevaricated in different statements, which he had at various times made as to the ownership of the property.

Mr. *Swanston*, and Mr. *Hull* for the petitioner.

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Mr. *Bacon* for the assignees.

Ex parte
COLLIER.

ERSKINE, C. J.—Supposing, as you might do, you were to call *Horatio Collier* into the box, and examine him upon the subject, and his evidence showed that he had always stated the same thing, which was in favour of this claim; then the production of these documents would not be needful. But supposing you had occasion to contradict him, in what way would the production of them assist you? The case having been stated by the assignees for counsel's opinion, could be no evidence against *H. Collier*, who had nothing to do with it. You cannot therefore have a right to its production, even if we had power to order it.

Sir JOHN CROSS concurred.

Sir G. ROSE.—Whatever right you might have in equity, you cannot come to this Court for any such species of relief. You are seeking on petition for discovery; and a bill is the only way of getting it. Another point against you is, that if the case in question were submitted to counsel with a view towards the present litigation, you could not, according to the recent case of *Bolton v. Corporation of Liverpool* (a), demand any discovery of it.

The Court refused to order the production of the document.

(a) 1 Myl. & Keen, 88.

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Ex parte WILLIAM DEVAS and THOMAS EVANS, and
WILLIAM WILLIAMS on behalf of himself and
JOSEPH LAWLESS, his co-assignee.—In the matter
of JAMES KENTON.

Westminster,
April 26 & 26.

Where a commission issued in 1823, under which the bankrupt never obtained his certificate, and a fiat issued against him in 1832, the Court refused, under the circumstances, to supersede the fiat.

Multifariousness is not sufficient cause for the absolute dismissal of a petition; *aliter*, where the defect is want of proper parties.

THE commission in this case issued in June 1823, under which the bankrupt had not obtained his certificate; afterwards, a fiat issued against him on the 9th May 1832; the rescinding of which was the object of this petition. The first two named petitioners were formerly partners, but the co-partnership had been since dissolved. *Williams* and *Lawless* were the assignees of *Nicholas Shiers*, who had been declared bankrupt on the 20th September 1826, and who prior thereto, in June 1823, had been chosen assignee of *Kenton* under the commission. In that commission the bankrupt was described as *James Kenton* of Stow-on-the-Wold, Gloucestershire; but the fiat described him as of 172, High Street, Poplar. Under the fiat *Mr. Gibson* was appointed official assignee, and *Thomas James Smith* and *Joseph Hadland* were chosen the creditors' assignees.

The petition proceeded to state that *Shiers* was then resident in America, and was not expected to return; that the petitioners had never heard of the fiat being issued till the latter end of January 1834; that the assignees under the fiat had possessed themselves of property, which ought to be divisible among the creditors under the commission. Under the commission, *Shiers* had, on behalf of himself and his partner *John Whitaker*, proved a debt of 130*l.* 10*s.*; but no other creditor had proved under it. The petitioners *Devas* and *Evans*,

however, were stated to be creditors to the amount of 200*l.* and upwards, the debt being contracted with them during their partnership; and there were other creditors to the amount of upwards of 1000*l.*, who had neglected to prove their debts, owing to there being little likelihood of any dividend being made, under *Kenton's* estate. On behalf of the petitioners, a notice was served on the Commissioner, the official assignee, and the creditors' assignees under the *fiat*, of the existence of the *commission*, and that the present petitioners would be preventing and cautioning them not to distribute any of the bankrupt's estate which had come to their hands. A dividend was, however, declared under the *fiat* on the 11th February 1834.

The petition prayed, that the proceedings under the *fiat* might be stayed, and that it might be rescinded; and that *Shiers* might be removed from the office of assignee under the *commission*, and for a new choice; and that the assignees under the *fiat* might account to such new assignee, to be appointed under the *commission*, for the property of the bankrupt come to their hands; and for consequential directions.

The petition was signed as follows—" *William Devas*, for self and *Thomas Evans*. *William Williams*, for self and co-assignee *Joseph Lawless*."

The bankrupt *Kenton* had absconded and was outlawed, and therefore was not served with the petition.

Mr. Montagu, and *Mr. Wright*, appeared for the petitioners.

Mr. Swanston, and *Mr. Bethell*, for the respondents, the assignees under the *fiat*, before going into the

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merits of the petition, took five preliminary objections to its being heard.

In the first place, the petition is multifarious. It prays, under the *commission*, that a new choice of assignees may be made,—and then, under the *fiat*, that our clients may account for and deliver up the property come to their hands. It is very manifest, that the assignees under the *fiat* can have nothing whatever to do with the new choice of assignees under the *commission*. The former are not the proper parties to such a petition; and therefore, as to that part of it, it is multifarious.

Secondly. The petition is informal, as regards the petitioners, and the character in which they appear. It is a rule established beyond contradiction, that a creditor who has not proved cannot interfere in any way, and cannot be heard in Court upon any matter, unless it be upon an application for liberty to prove, or upon petition praying to supersede the particular commission under which he might prove. The petitioners *Devas* and *Evans* have therefore, at present, no pretence for coming here on such a petition as this. They have not proved under the commission; nor are they seeking to prove, or to supersede, the commission. Again, how does the petitioner *Williams* stand? He, on behalf of himself and co-assignee *Lawless*, appears as the assignee of *Shiers*, in respect, not of a debt due to *Shiers* alone, but of a debt due to *Shiers* and his partner *Whitaker*, whom *Williams* and *Lawless* cannot be said to represent.

Thirdly. The signature of the petition by *Williams* is defective. One assignee alone cannot sign a petition;

for in *Ex parte Morgan* (a) it was held, that a petition of assignees must, under the General Order of 12th August 1809 (b), be signed by all who present it, and not by one only, as in the case of partners. [Sir John Cross. Is this a petition presented by *Williams* and *Lawless*? Is it not presented by *Williams* alone, though on behalf of himself and *Lawless*?] If so, is it not liable to another objection? *Lawless* is decidedly interested. He is not, under the view suggested by your Honor, a petitioner, and certainly he is not served as a respondent; yet he ought to be made a party (c).

Fourthly. The affidavits are irregularly intituled. It is thus merely;—"In the matter of *James Kenton*." Now, there are two "matters of *James Kenton*" pending; one a commission, and the other a fiat, both in bankruptcy. Suppose perjury were required to be assigned for matter contained in these affidavits, how could an indictment be sustained, as that must be on a pending and material proceeding? For it would not be possible to prove, whether such affidavits were in the matter of the commission, or in the matter of the fiat.

Fifthly. The petition seeks to supersede the fiat. But the petitioning creditor is not served, and does not appear before the Court. This is necessary, not only as a matter of right towards the petitioning creditor

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(a) Buck, 109.

(b) 2 Deac. B. L. 98.

(c) Mr. Barber, the Registrar, referred to a MS. case of *Warner v. Hellier*, before Lord Eldon 1st December 1821, where the objection was taken that the petition stated it to be the petition of the assignees, though only signed by one of them. The Lord Chancellor said—"The petition must be amended; one assignee cannot sign for all, and describing it as the petition of the assignees. The party signing it cannot be heard upon it as his individual petition."

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himself, but as regards the assignees under the fiat; for if the Court were inclined to supersede the fiat on the ground of informality, the assignees would be entitled to indemnity and protection from the petitioning creditor.

The Court recommended that the counsel for the respondents should at all events abandon the last three objections; observing, that if the third and fourth were tenable, then the petition and the affidavits might be amended; and as to the fifth, the petition might stand over, in order to serve the petitioning creditor. Besides which, his absence would only be material, in case the Court were inclined to supersede; which at present, from looking into the petition, they did not feel they would be called upon to do.

The third, fourth, and fifth exceptions, were not therefore relied on.

Mr. *Montagu* and Mr. *Wright*. As to the charge of multifariousness, it can only exist, where distinct persons apply for distinct objects of relief. In *Ex parte Bousfield* (a) this objection was taken, because it was a petition of several creditors, for the proof of their respective debts; the petition also praying a renewed commission, and a new choice of assignees; and the objection was overruled by the Lord Chancellor, because the creditors had one common cause of complaint, and one common object. In *Ex parte Coles* (b), the bankrupt petitioned to expunge several proofs upon

(a) Mont. 128.

(b) Buck, 258.

distinct grounds, and that was held to be multifarious. But in this case there is but one common object. All the petitioners are interested in the same parts of the prayer. The common object is the reviving and sustaining the commission, which is not to be arrived at, unless the whole prayer be granted. [*Erskine*, C. J. But this is to supersede the *fiat*, and for a new choice under the *commission*.] That is the common and ordinary way of petitioning in this kind of case. All the petitioners are interested in superseding the *fiat*, and all are interested in the appointment and choice of another assignee. As to the second objection, namely, the *locus standi* of these petitioners. To prevent any objection being taken to the assignees of *Shiers* alone being the petitioners, two others, creditors of the bankrupt, are introduced as petitioners, namely, *Devas* and *Evans*. They, as creditors, are alone sufficient to sustain the petition. The partner of *Shiers*, however, is dead; and if the Court shall think that the debt to *Shiers* and *Whittaker*, having been relied on as necessary to support the petition, obliges us to bring all parties interested in that debt before the Court, (though the introduction of that part of the case was unnecessary, since *Devas* and *Evans* were alone sufficiently interested to support it,) we admit that *Whittaker's* representatives must be served. That, however, will not invalidate the petition, for the Court will allow it to stand over for the purpose of service (a).

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ERSKINE, C. J.—If the first of these objections is insisted on, it certainly appears to me that this petition

(a) *Ex parte Brown re Lloyd*, 3 Dea. & Ch. 406.

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is multifarious. It prays that the fiat may be superseded, and that the property acquired under it may be delivered up, and that the order of dividend, now about to be declared, may be suspended. Thus far these three objects are perfectly consistent one with the other,—all pointing to the same end, namely, to get rid of the impediment of the fiat. That does not render the petition multifarious, as each object is auxiliary to the superseding the fiat. But the petition proceeds to ask, that *Shiers* may be discharged. This part of the prayer is unnecessary, as it might be done under the General Order (a). The petition goes on then to ask that a new choice may be made of an assignee under the commission, in the room of *Shiers*. This is, at all events, quite collateral to the prayer for the supersedeas, and none of the parties insisting on the fiat can have any thing to do with it. But I think it would be too strong a measure of justice, to hold that to be a sufficient reason to dismiss the petition. And if the objection be still pressed upon us, the most I should feel inclined to do upon it, would be to order the petition to stand over, with liberty to amend it, giving the respondents the costs of the day.

Sir J. Cross.—The objections to this petition are now reduced to two in number, viz. that of multifariousness, and that of it being presented by improper parties. The objects of the petition are twofold: the first, that the commission may be proceeded with; and the second, that the fiat may be superseded. But it seems to me, that it is not presented by the proper parties.

(a) See Lord Loughborough's General Order of 8th March 1794, 2 Desc. B. L. 90.

The first two named have never proved, although the commission is near twelve years old. They might have applied to prove at a much earlier period; and if they had then been accepted, they would have entitled themselves as creditors to have presented some such petition as the present, and the Commissioners might then have granted what they seek, as regards the new choice. As it is, they come with a very ill grace. They are strangers to the commission, who have slept on their rights at least nine or ten years, seeking to upset a recent fiat. As to the other petitioner *Williams*, (taking it for granted he is right in coming here without *Lawless*, his co-assignee,) he and *Lawless* only represent *Shiers*, who is but entitled to a moiety of the debt due from the bankrupt *Kenton* to *Shiers* and *Whitaker*; and I think they cannot petition without *Whitaker* also being here. My opinion upon the second objection is so strong, that I do not think it needful to go into that of multifariousness.

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Sir G. ROSE concurred.

Mr. *Swanston*. The petition is now admitted by the Court to be multifarious, and therefore I ask, as a matter of right, that it shall be dismissed with costs. The parties have by their own acts placed themselves in this dilemma, namely, that it would have been next to impossible to have framed a petition to meet their case, without it being open to the objection, that it was multifarious. Upon the other ground, namely, the absence of any right whatever on the part of these petitioners to apply, we press for the order of dismissal with costs.

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ERSKINE C. J.—If the objection to the parties be insisted upon by the respondents, and be allowed by the Court to prevail, it must end in the dismissal of the petition, because no amendment can cure it. But I am by no means satisfied, that the petition is improperly presented by *Williams* and his co-assignee,—the latter of whom we must now look upon as a party, the objection to that part of the case being waived. They are creditors, and were so prior to the commission, and have an interest in disposing of any impediment to it, and therefore may apply to supersede the fiat. And on this ground, I think there are parties to the petition before the Court sufficiently interested to support it.

As to the objection of multifariousness, there is no doubt but that that part of the petition which prays the removal of *Shiers*, and for a new choice, is irrelevant and unnecessary, and the respondents must not be called on to bear the costs of so much of the petition. But as the parties are now prepared to go into the merits, I think, that the least we can do, is to allow it to stand over for amendment; it would be improper, merely for the sake of practice, to dismiss the petition.

Sir J. Cross felt inclined to differ in the view he took of this part of the discussion; but the counsel for the respondents consented to consider the petition as amended, and to proceed on the argument upon the merits.

Mr. *Montagu*, and Mr. *Wright*. The view that we

take of the merits is, that the fiat, having issued during the existence of the first commission, is *ipso facto* void at law, and we have a right to come here and demand that it shall be superseded. This question has been under considerable discussion of late, both in the King's Bench, in the case of *Bailey v. Michells* (a), and in Chancery, in the case of *Ex parte Welch, in the matter of Merryweather* (b).

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Sir G. ROSE.—Allow me, in the outset of your argument, to suggest the view I take of this case, which being one purely of principle, I for one have had frequent opportunity of considering very maturely on other occasions. We may take it for granted, that a second commission, where the bankrupt has not obtained his certificate under the first, or a third commission, where he has not paid 15s. in the pound under the second, is bad at law. If even a bankrupt had got his certificate under the second commission, without having obtained it under the first, I say, at law, the second certificate would be *ipso facto* void (c). This has been held both by Lord Chancellors and by Vice-Chancellors. But at the same time it has always been considered as open to those interested in supporting a second commission, to come to the Lord Chancellor, and upon the state of circumstances contest the first commission, and pray for a supersedeas of it. The question of supersedeas has then always resolved itself into one of expediency and discretion.

(a) *Mich. T. 1832.*(b) *Mont. 276.*(c) See *Hill v. Wilson*, 7 Barn. & Cres. 684; *Fowler v. Coster*, 10 Barn. & Cr. 427.

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If the second commission had issued, with the consent and knowledge of the assignees under the first,—if the latter have been guilty of neglect in not prosecuting their rights,—and if, by sleeping upon those rights, they have, as it were, induced the issuing of the second commission, then I think it is for the petitioners in this case to make out, that the Court ought not, in the exercise of its discretion, to supersede the first.

ERSKINE C. J.—In *Ex parte Lane* (a), there was a third commission; and the Vice-Chancellor, regarding it as void at law, directed it to be superseded. But there he seemed only to do so as a matter of expediency, and in the exercise of his discretion. And in the case of *Ex parte Poulden* (b), Lord Eldon expressly maintains that the superseding the second commission is a matter of discretion on the part of the Court. So in many other cases.

Mr. Montagu, and Mr. Wright, in continuation. We shall presently proceed to show, that it has always been usual to supersede the second commission. But first, it is necessary to refer to those cases which contain the principle, that the second commission is absolutely void at law, where the bankrupt has not obtained his certificate under the first. In *Hill v. Wilson* (c), it was so decided; and though that case was called in question by the case of *Fowler v. Coster* (d), yet this latter case fully established the doctrine. The same was held in the case of *Nelson v. Chirrel* (e), and so clear

(a) Mont. 12.

(b) 16 Ves. 472.

(c) 7 Barn. & Cr. 684.

(d) 10 Barn. & Cr. 427.

(e) 7 Bingham, 663.

were the Court in favour of the doctrine, that all argument upon the question was stopped. So also in *Phillips v. Hopwood* (a), and, in effect, in the case of *Bayley v. Michells* (b). The legislature, by the introduction of the 127th section into the 6 G. 4. c. 16., also recognizes this principle, by giving authority to the assignees under the first commission to seize all future acquired property. It might be said, that a petition to supersede is not the proper remedy to pursue in this case; and that the first assignees ought to proceed by action to recover the property taken by the second set of assignees. But a petition is by far the more usual, and certainly the better course to pursue. This Court has the power to grant the supersedeas; and the reasons for the institution of the Court will warrant it in doing so; thereby to save the expense and delay that will otherwise arise.

The Chancellor has always been in the habit of granting these applications, on petition,—sometimes of the assignees, as in the cases of *Ex parte Bullen* (c), *Ex parte Bold* (d), *Ex parte Degraives*, and *Ex parte Lees* (e),—and sometimes of creditors, as in the cases of *Ex parte Proudfoot* (f), and *Ex parte Poulden* (g). And though it appears never to have been done hitherto, yet from the cases of *Ex parte Crew* (h), and *Ex parte Cridland* (i), it seems that such a petition presented by the bankrupt would be entertained. In *Ex parte Lees*, and *Ex parte Poulden* (h), also, Lord

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(a) 1 Barn. & Adol. 619.

(b) K. B. Mich. Term, 1832.

(c) 1 Rose, 186 (a).

(d) Cooke, 10.

(e) Cited 1 Mont. & Gregg. Dig. 399, n. (g).

(f) 1 Atk. 252.

(g) 16 Ves. 472.

(h) 16 Ves. 236.

(i) 2 Rose, 164.

(k) 16 Ves. 474.

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Eldon expressly says, that such a petition may be proper, under circumstances, if a creditor were joined: though in that case he refused the petition, because the creditor joining was the father-in-law of the bankrupt, who had been guilty of some fraud.

Such then are the principles of law, and such was the course of practice before the Lord Chancellor. And the only cases in which the superseding the second commission has been refused, are those in which there has been fraud and concealment on the part of the persons interested under the first commission; or where the second commission has issued by actual or implied contract between the parties to the first and second commission.

We will now show the cases, first, where the Court has refused to supersede the second commission, and secondly, where the contrary has been done. It has been refused, where the creditors under the first commission have consented, by positive act, that the bankrupt may trade,—as in *Ex parte Proudfoot (a)*, where the facts were these. *Jackson* was declared bankrupt in 1732, and assignees were chosen; after which, upon his raising 40*l.* for expenses of the commission, and 100*l.* to be divided between his creditors, four-fifths signed his certificate, but the commissioners refused to sign it; the money was repaid to *Jackson*, and nothing more was done under that commission. *Jackson* then set up a different trade in a different part of the town; and being largely indebted, a second commission issued in 1736; assignees were chosen, and he obtained his certificate. Lord *Hardwicke* there says, in his judgment (*b*), “ The second commission was taken

(a) 1 Atk. 252.

(b) Page 262.

out four years after the first; the certificate signed three years ago, and allowed by me two years and three-quarters; nothing clandestine appears; but an advertisement has been put into the Gazette as usual, for creditors assenting or dissenting to the certificate, and was plainly intended that the creditors under the first commission should meet, because the advertisement was put in by the assignees under the first; the two assignees under the first, and several of the creditors, met accordingly, and accepted of 65*l.* towards the charges of the first commission, and the expense of a law suit; and in consideration of this sum, the assignees of the first commission withdrew their petition, which was filed before this meeting for superseding the second commission. I am of opinion, therefore, on the circumstances of this case, that I cannot set aside the second commission; because it would be a great prejudice and injustice to those persons, who have given *Jackson* credit ever since his certificate was confirmed, which is no less than two years and three-quarters ago."

In *Ex parte Bullen* (a), also, it was said by the Lord Chancellor, that "a second commission, while a first is subsisting, is, strictly speaking, void; but such commission can only be set up against a subsequent one, when it is in legal operation. If the parties under the first have by contract placed themselves in a different situation, I will not suffer them to defeat the fair claims of creditors under another." So in *Ex parte Bourne* (b), Lord Eldon says, after stating the general rule as to the invalidity of second commissions, "Take the instance of a commission taken out in 1820, and another taken out

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and others.

(a) 1 Rose, 156.

(b) 2 Gl. & J. 141.

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against the same person four or five years afterwards upon a subsequent trading;—if he has been permitted to go into the world as a trader and to gain credit as such, whatever a Court of Law might say about the rights of creditors under the first commission, this Court has said it would support the second commission to this extent, —that it would not permit the creditors under the first commission to take that, which they could not take without injustice to the creditors under the second, whom they have permitted to deal with the bankrupt, as if he had obtained his certificate; and that they should only take that part of the bankrupt's subsequently acquired property, which should remain after all the creditors who had been so permitted to deal with him after the first commission, should have been paid; that the profits derived by the bankrupt from such subsequent dealings, shall belong to the creditors under the first commission; but the debts contracted in his trading after he secondly engaged in trade, with the permission of those creditors, shall be first paid." The case of *Ex parte Lees* and *Poulden* (a), which has been already referred to, was decided on the same principle (b)

Neither will the Court supersede the second commission, where the bankrupt petitions, and will not bring the property into Court. In *Ex parte Rhodes* (c), which was a petition of the bankrupt, Sir S. Romilly contended in argument on behalf of the bankrupt, that notwithstanding the case of *Troughton v. Gitley*, it was never decided that merely because the assignees under the first commission did not claim the property, the second should therefore stand. The point

(a) 16 Ves. 472.

(b) *Suprà*.

(c) 15 Ves. 539.

was not decided, but Lord *Eldon* expressed no doubt as to the doctrine; and indeed he said he would make no order on it, until notice of the application had been served on the assignees under the former commission, or till they informed him, the Lord Chancellor, whether they meant to claim the effects or not. So in *Ex parte Lees* and *Poulden* (a), a similar observation was made by Lord *Eldon*. In *Ex parte Crew* (b), the first commission issued in 1795, and the bankrupt, who was the petitioner, remained uncertificated. He changed his place of residence and traded in another name; and in 1809 a second commission issued against him. The petitioning creditor under that, knew that the prior commission was subsisting, and that the bankrupt was uncertificated. Lord *Eldon*, in that case, says, "I am well aware of all the difficulties that belong to the case of two commissions subsisting against the same person. In law, the second commission is good for nothing. The assignee cannot bring an action, or protect himself under it; in short, the second commission cannot have any operation, except under direction or arrangement here. If a joint commission issues against persons, one of whom has been declared a bankrupt under a separate commission against him, the joint commission is a nullity, one of the parties being already a bankrupt under a prior commission. So a joint commission subsisting, a subsequent separate commission against one of those bankrupts is a nullity. We are now in the habit of making an arrangement, superseding the one or the other, as may best answer the ends of justice; but in Lord *Hardwicke's* time, both the joint and separate commissions stood together, and

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(a) 16 Ves. 474.

(b) 16 Ves. 236.

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that being permitted, the necessity was felt of giving the bankrupt, by arrangement, the benefit of a certificate, to be signed by some creditors of a class who, strictly speaking, could not come in. It has therefore been usual, upon an application of this sort, to direct the petition to stand over, with notice to the creditors under the prior commission: whether the property is to belong to one class of creditors or to another, or upon what terms it is to be distributed, is the subject of arrangement. The case of *Troughton v. Gitley*, and the others, are attended with sufficient difficulty; but they have never been carried to this extent, that the creditors shall not have notice." The petition was accordingly directed to stand over: with notice to be given by the bankrupt to the creditors under the first commission, and to the petitioning creditor under the last.

2dly. Where the Court will interfere. In general, (putting out of the argument the case of *Ex parte Welsh* (a), upon the application of the assignees under the first commission, the Court will supersede the second, unless the right under the first has been waived by the contract and arrangement, or the circumstance of fraud on the part of those interested under the first

(a) Mont. 276. Sir G. Rose, in the course of the argument, stated, that there was some omission in the printed report of one or two important facts in this case, which ought to be noticed. The case came on by way of appeal from the Vice-Chancellor's judgment, which the Lord Chancellor reversed. The fact of the composition having taken place, was denied by the respondents, and the petition stood over for evidence of the composition, which not being satisfactory, when the case came on again, the Lord Chancellor founded his decision on that fact alone. Otherwise, on the facts as they are stated in the report, the second commission would not have been sustainable; as there would have been no grounds to reverse the decision and refuse to supersede.

amount to a waiver. [*Erskine*, C. J. For this purpose, contract is to be inferred from all circumstances of permission.] In *Ex parte Lees* (a), there were gross circumstances of fraud, arising from the relationship between the two petitioners, the one the bankrupt, and the other the petitioning creditor; but if those circumstances had not appeared, it seems that the second commission would have been superseded, leaving the parties under it to come in under the first upon an equitable arrangement. And in the case now before the Court, no great hardship can accrue, if the Court were inclined to support the commission upon the like principle.

The cases in which the Court has interposed to support the second commission, have always been regarded with considerable doubt; and in general the Court, before it would so act, has required a bill to be filed. In *Ex parte Storke* (b), the Lord Chancellor says, "There is no case in which this equity has been administered on petition. I have no objection to the filing a bill. Whatever may be said or thought of the case of *Troughton v. Gitley*, there is a great mass of negative authority against it in the repeated offers to the bar to turn these petitions into bills, if it was thought proper to dispute whether the second commission had any effect. As to the equity between the creditors, there are great difficulties. First, if creditors are to be bound by the negligence of the assignees,—suppose them ignorant of the second trading, but that all, or some of the creditors are cognisant of it,—there is an equity against some, and not against others. Then the second commission is an

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(a) 16 Ves. 472.

(b) 9 Ves. & B. 106; S. C. 2 Rose, 179, and see the cases there cited.

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Ex parte
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and others.

authority to distribute, for all the creditors having demands subsequent to the first commission; and many of them may have had no concern with the subsequent trade he carried on. There is, however, so much to be broken through upon points that have been long considered settled, that it is impossible to do this upon petition. I repeat the offer that has been frequently made from this place, that you may file a bill if you please; a course the more proper on account of a case now depending before the Master of the Rolls." If any thing therefore is to be done in support of the fiat in this case, it must either be by arrangement, or by cross petition, or by bill filed by the assignees under it, praying for a supersedeas of the commission.

Now, what are the facts upon which the respondents would rely in support of the fiat? The commission was issued in 1823, and it was then discovered, as was supposed, that there was no property to divide; and, therefore, it was not worth the creditors' while to prove their debts under it. The commission, however, still subsisted; and that fact, and the circumstance of the bankrupt being uncertificated, might have been known to those issuing the fiat, by inquiry at the bankrupt office, had the least diligence been used by them. It subsequently turns out, that the bankrupt becomes possessed of property, which it might be contended had been amassed by some subtraction by the bankrupt of property, which he did not disclose under the first commission. There is not the slightest evidence, that the petitioners were aware of the subsequent trading; and it is sworn, they did not know of the fiat being issued till the end of January 1834; immediately upon which, they proceeded to present this petition.

Can it be thence said, that there is any hardship operating on the respondents, which, in equity, should entitle them to divest the petitioners of the legal right they have to the property in question? We submit there is none, and that this petition must therefore be granted.

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Mr. *Swanston*, and Mr. *Bethell*, for the respondents, were stopped by the Court.

ERSKINE, C. J.—The prayer of this petition is now confined to its proper object, namely, to the superseding the fiat,—and as a consequence, the restraining the assignees under it from proceeding towards payment of a dividend.

There is no doubt of the general proposition, that a second fiat, issued during the existence of the first, against an uncertificated bankrupt, is absolutely void, and that no right whatever under the second is maintainable at law. This was conceded to the petitioners at an early stage in the argument upon the merits; and, therefore, the question now to be decided by us, is not a question of law; but whether, in the exercise of our discretion, the facts of this case, as appearing upon the petition and affidavits, are sufficient to induce us to supersede the fiat.

It is said, that a second commission being regarded as absolutely void at law, we ought, as of course, to supersede it; and it is urged, that it has always been the practice to supersede it, unless it can be shown that there has been fraud in the working of the first commission, or that, through an implied or express contract, the second commission may be regarded as issued with the

1834.

Ex parte
Davas
 and others.

consent of the parties interested under the first. To establish that proposition, several cases have been cited. The only cases, it appears, in which the second commission has been superseded, are those of *Ex parte Bold* (a), and *Ex parte Lane* (b). In *Ex parte Bold*, a petition was presented by the assignees under a first commission to supersede a second commission, which had issued against the same bankrupt, while uncertificated under the first; and Lord *Loughborough* said, he could not let the second commission stand, and that he must of necessity make the assignee under that commission account to the assignees under the first, but without prejudice to the question, which the creditors since the first bankruptcy might make to an equitable preference in payment out of the subsequently acquired effects. In *Ex parte Lane*, the Vice-Chancellor said, "I have no alternative; as the second commission is void at law, how can I permit it to stand?" There were no circumstances there to warrant that conclusion; and I may say, that it was a departure from the general rule, which has always been maintained, namely, the exercise of a degree of discretion founded on the facts of the case. The Vice-Chancellor seems entirely to have proceeded on the authority of the dicta of the Judges in the King's Bench and Common Pleas, viz. that the Lord Chancellor has no power to issue a second commission, pending a first. That doctrine has, however, been expressly repudiated by the Lord Chancellor in the case of *Ex parte Welsh* (c), and it is contrary to all the prior opinions of Lord Chancellors in similar cases; and justly so, because, if it were maintainable, it must be

(a) *Cooke*, 10.(b) *Mont.* 12.(c) *Mont.* 288.

carried to this extent; viz. that a second commission could not be issued by the Lord Chancellor, even though all the creditors under the first were satisfied, and though the commission had tacitly dropped to the ground, if it were not regularly superseded. That view is, I think, fatal to those dicta which militate against the Lord Chancellor's power to issue a second commission.

1884.

Ex parte
Davas
and others,

In *Ex parte Rhodes* (a) the Lord Chancellor, it is said, would not allow the future effects to pass to the assignees under the second commission, though it was 19 years after the first, until, by notice served on the first assignees, he had ascertained, whether it was their intention to claim those effects or not. I cannot, however, regard that case as of any very great assistance to the petitioners here; for the point does not seem to have been much pressed. It is argued, that if the facts of this case are looked at, we shall find nothing in them to take this case out of the general rule, that the second commission is void, and must be superseded. But I think the present case is almost parallel to that of *Ex parte Lees* and *Ex parte Poulden* (b); and Lord Eldon there says, "It has been said correctly, that though the second commission is void at law, the Court does not, therefore, supersede the commission. That has frequently been refused, admitting the commission to be void at law, the party standing in circumstances under which he could not be heard for that purposes; as in many cases it might be fit to leave those who claimed under the commission to attempt to maintain it at law, and if the first commission had been kept on foot 15 years, with the

(a) 16 Ves. 539.

(b) 16 Ves. 472.

1834.

Ex parte
Devas
and others.

view of protecting the bankrupt, and enabling him to defraud all those with whom he might deal in subsequent transactions, I should rather supersede the first commission at the instance of the assignees under the second, than the second at the instance of the assignees under the first." Here is also shown a clear discretionary power vested in the Chancellor to supersede the first commission, although at law the second may be void; and the Lord Chancellor would not supersede the second, unless there was an absence of those circumstances of fraud or contract before alluded to. Now, what are the circumstances of this case? Throughout this business there has been the greatest delay. Nothing was done under the first commission. The parties interested under it have also fallen asleep; for though the fiat was issued in 1832, it is not till 1834 that the petitioners come forward to advance their claims. Then, looking at the character in which the petitioners stand, *Devas* and *Evans* have never during all this lapse of time attempted to prove under the commission; they have entirely lain by for about eleven years. Can we therefore for parties like these, and under such circumstances,—nothing whatever having been done under the first commission, and the bankrupt having been allowed to appear as a fresh man, and to obtain fresh credit in the world, by the inactivity of those who ought to have prosecuted the first commission long ago,—can we, I say, do such an injury, as to support the commission and supersede the fiat? I certainly think we ought not. And I, for one, shall rather leave the petitioners to substantiate their legal rights at law, if they think they can derive any benefit from so doing. They may, without our

intervention, have a new choice of assignees, and proceed to prove their debts; but I can neither concur in superseding the fiat, nor in restraining the assignees under it in the manner prayed. It is not necessary for us, in this view of the case, to consider the objection of the absence of the petitioning creditor; which, though waived by the counsel for the respondents, would not have helped the petitioners; as no party before the Court would be authorized to make such a waiver.

1834.

Ex parte
Devas
and others.

Sir JOHN CROSS.—I have listened attentively to the argument, and I have not discovered one rule of law, or of equity, which is in dispute. The discretion of the Court is admitted by the petitioners; and all the cases they have cited, as being in their favour, make, in my humble judgment, most strongly against themselves. Petitioners coming to support a prior commission, clothed with such circumstances as in the present instance, should show at all events a strict legal title to relief. But here the petitioners have not even proved their debts. I therefore entirely concur that this petition must be dismissed.

Sir G. ROSE.—Nothing could well be more completely established at the time this Court was instituted, either at law or in equity, than the principles upon which this case is governed. At law, the second commission against an uncertificated bankrupt is void; but in equity there is a discretion, whether the first or second shall be superseded: and I concur in all that has fallen from my two learned colleagues.

It should however be thoroughly understood, on

1884.

Ex parte
DEVAS
and others.

what principle this Court feels itself bound to proceed in this case, circumstanced as it is. When in a Court of Law it is said, that a second or third commission against a bankrupt uncertificated under any prior one, is absolutely void, I beg to express my dissent from that opinion; for such a doctrine is irreconcilable with law or equity; and I am glad to find, that my dissent from that doctrine is sanctioned not only by that of the present Lord Chancellor (a), but by that also of all his predecessors. Lord *Brougham's* opinion is, that on a question of evidence upon a litigated title, the second commission is not available at law; and that it was only because the assignment under the second could not be sustained, the property having passed under the first assignment, that the second commission, upon which the second assignment was founded, could not be supported as against the former. It is not the *commission* that is void, but the *assignment* only in cases of this kind. Thus, if an action of trover be brought, the assignment is the title, until the assignees are compelled to support their title by the commission. If there were 500 commissions, the title under each would be good, until a better assignment is established by reason of its priority. Coming into equity, we have to apply the principle of law, that the first commission is good and the second bad; and then we have to engraft equitable principles upon that of a different nature. We have to see what are the equities between the parties. We adopt the maxim *equitas sequitur legem primâ facie*; but if there be circumstances of fraud or contract in the case, we then do justice between the parties; and in the exercise of our

(a) Lord *Brougham*, in *Ex parte Welsh*, *suprà*.

discretion, we say which is the proper commission to sustain; and accordingly we make the strict legal rights subservient to the equitable rights of the parties; and prior commissions have often been superseded in this manner of viewing the case.

1884.

Ex parte
Devas
and others.

The petitioner's counsel have contended that, as a general rule, the Court will supersede the second commission. But in this I beg leave to differ with them. The convenience, or the inconvenience, of sustaining two different commissions is the first point to be considered; and the embarrassment arising from the working of two commissions may induce the Court to remove either the second, or the first, whichever proceeding will afford the best means of working out the equities of all parties. For instance, if two commissions exist, there is always likely to be a contest which party shall have the bankrupt's books; and therefore the Court, to avoid the difficulty, supersedes that which is least beneficial. So the debts may be claimed and disputed under both commissions, or the bankrupt may be subject to the harass of two examinations upon the very same matters.

This petition is also improperly presented. The petitioners have never proved as creditors under the commission; and though a petition may be presented to supersede a fiat by creditors, notwithstanding they have not proved, yet it is only in a case where they come to dispute the fiat under which they might prove, and not where they come to sustain a prior one, under which they would have a right to establish themselves as creditors by proof, but have neglected to do so. At present the petitioners are not creditors under the commission.

Looking at all the circumstances of this case, which

1834.

Ex parte
DEVAS
and others.

need not be repeated, I think it would be the grossest injustice to uphold the first commission in preference to the fiat; insomuch so, that if new assignees were chosen under the commission, and they went to law, and established their legal title to the effects taken under the fiat, I am persuaded that the assignees under the fiat would be entitled, in equity, to an injunction to restrain the first set of assignees from availing themselves of such legal title. I therefore think this petition must be dismissed, with costs.

Petition dismissed, with costs; the proceedings under the commission being ordered to be impounded, with liberty to apply.

Ex parte EVANS and others.—In the matter of
BENTLEY & Co.

Westminster,
January 31,
1835.

Reference to the Commissioner to allow, on the taxation of the petitioning creditor's bill of costs, certain expenses incurred before adjudication by parties appointed by the creditors to act for the benefit of the estate.

THIS was the petition of the assignees, to be allowed a sum for extra costs, which had been incurred by them under the following circumstances. The docket was struck some time before the fiat actually issued; and four creditors were appointed by the others, at a meeting held for that purpose, to consider what was best to be done for the benefit of the estate. *Bentley* had absconded in September last with a large portion of the property; and it being necessary to take the most prompt measures for recovering it, various expenses were incurred subsequent to the docket and before adjudication, by the parties who had been appointed by the creditors to act for the benefit of the estate. Three of these per-

sons were afterwards chosen assignees. At the taxation of the petitioning creditor's bill of costs by the Commissioner, the creditors then present wished these expenses to be allowed; and the Commissioner had no objection to do so, but thought that under the provisions of the act of parliament he was not justified in making the allowance, without the authority of this Court. The assignees therefore now presented a petition for that purpose.

1835.

Ex parte
EVANS
and others.

Mr. *Bethell* was in support of the application.

The COURT thought it was reasonable that it should be referred to the Commissioner to allow such costs as he might think proper, together with the costs of this application.

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Ex parte JARMAN.—In the matter of THEED.

THIS was the petition of a creditor (who had not proved) to annul the fiat, or to stay the certificate, under the following circumstances, as alleged in the petition.

The petitioner was the holder of a bill of exchange for 300*l.*, drawn by one *Bentley*, and accepted by the bankrupt, and indorsed to the petitioner for a valuable consideration, which was stated to be goods sold by the petitioner to the amount of 80*l.*, and a check for 220*l.* This bill became due on the 28th December 1833.

The bankrupt had been educated at Harrow, was a
been opened, and the petitioner has filed affidavits in reply, order the petition to stand over, on his application for that purpose.

Southampton
Buildings,
February 17,
1835.

Coram
Sir J. Cross.

Although a fiat is fraudulently sued out, yet a creditor, whose debt is impeachable on the ground of usury, cannot petition to supersede it.

Where no sufficient advantage will be gained by a *void* *voce* examination, the Court will not, after a petition has

1835.

Ex parte
JARMAN.

member of the University of Cambridge, and previous to the issuing of the fiat had lived in London as a gentleman in the best style of society, having received a fortune on the decease of a relative of upwards of 30,000*l*. He was described in the fiat as "*Thomas Theed*, of No. 43, West Square, in the county of Surrey, late of Hans Place, Sloane Street, in the county of Middlesex, *picture dealer*." It was alleged in the petition, however, that he never was a picture dealer, or engaged in any trade; that he never resided in West Square, but that his place of residence was Hans Place, and that in order to mislead his creditors, he took a lodging in West Square for the purpose of fictitious trading; that having contracted debts to a considerable amount, he caused the fiat to be issued with the intention of clearing himself from such debts, and of injuring and defrauding his *bonâ fide* creditors; that the petitioning creditor was a picture dealer, and a most intimate friend of the bankrupt, and was appointed sole assignee, and that there was no estate to be divided under the fiat; that the bankrupt had for some years past frequented horse races, and had been extensively engaged in gaming and wagering; that he had lost by gaming and wagering in one day 20*l*; that he had lost, within one year preceding his bankruptcy, at Epsom races by gambling the sum of 200*l*., and the like sum at Ascot races. The petitioner alleged, that he could prove these various facts by the evidence of one *George Alderson*, and had applied to him to make an affidavit of them, but that he had refused so to do.

It further appeared, that *Bentley*, the drawer of the above-mentioned bill, became bankrupt himself before it arrived at maturity, and proved the trading of *Theed*,

in support of the present fiat; that only two creditors had proved under the fiat; and that *Theed's* certificate now lay in the office for confirmation, but that the only person who had signed it was the petitioning creditor.

1835.

Ex parte
JANMAN.

The prayer was, that the adjudication might be reversed, and the fiat annulled, at the costs of the petitioning creditor; and that the petitioning creditor, the bankrupt, and *G. Alderson*, might be examined *vivá voce*; or that if the fiat was not annulled, the certificate might be stayed.

In answer to the allegations in the petition, it was sworn that the bill for 300*l.* was indorsed to the petitioner by way of discount, but that only part of the amount was paid in money, while the other part was made up of pictures; and that consequently the debt of the petitioner was founded on an usurious transaction, the sale of the pictures being a mere shift to procure more than 5*l.* per cent. on the discount. The petitioner, however, had filed an affidavit in reply, denying the truth of this statement.

Mr. Montagu appeared in support of the petition, and urged the necessity of a *vivá voce* examination, if the Court had any doubt as to the facts stated in the petition.

Mr. Bethell, for the assignees. The party who wishes for a *vivá voce* examination, ought to make an express application for that purpose. The petitioner here having filed affidavits in reply, has waived his right to such examination. *Ex parte Baldwin (a)*.

(a) 1 Mont. & A. 617.

1835.

Ex parte
JARMAN.

Mr. Chandless, and Mr. Cooke, who appeared for the bankrupt, contended to the same effect. In *Ex parte Baldwin* the Court expressly determined, that an application to examine *vivá voce* should be made before the petition is heard on affidavit.

Mr. Montagu. In *Ex parte Thompson (a)*, the Court said they did not in *Ex parte Baldwin* lay down any general rule, that a party was positively estopped from having a *vivá voce* examination, after having read the affidavits; but that they must be guided by circumstances in granting the application. And in *Ex parte Dugard (b)*, where affidavits had been filed on both sides, the Court said that they would first hear the affidavits read, and if they left any doubt in the minds of the Court, that they would then hear *vivá voce* testimony.

Sir J. Cross.—The first question is, whether there is any necessity in this case for a *vivá voce* examination; and the expense of that proceeding also is not to be lost sight of. Under all the circumstances, I think that no sufficient advantage will be gained by a *vivá voce* examination, to justify the Court in ordering the petition to stand over for that purpose. If any of the parties are in Court, I will allow them to be examined; but it must be remembered, that they will be examined on points, which, if proved, would render them liable to a criminal prosecution.

Mr. Bethell then contended, that as the debt of the petitioner was tainted with usury, he was not a legal

(a) 2 Mont. & A. 40.

(b) 2 Mont. & A. 26.

creditor, and therefore could not petition to annul the fiat.

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Ex parte
JARMAN.

Mr. *Montagu*, in reply. If a petition to supersede disclose a case of fraud, the Court will not dismiss it on a preliminary objection that the petitioner is not a creditor (*a*).

Sir J. Cross.—The case of *Ex parte Hudson, in re Ramsden (b)*, appears to be nearly parallel with the circumstances developed in the present case. It was there prayed, as now, by a creditor who had not proved, that the certificate might be stayed, or a supersedeas granted; and the respondents impeached the petitioner's debt, on the ground of usury. And it was then decided by the Vice-Chancellor, and subsequently confirmed by the Lord Chancellor, that the petitioner had no *locus standi*, unless he was a creditor, and that there ought therefore to be a previous inquiry to ascertain that fact. With respect to the other features of the case, I am clearly of opinion that the fiat is fraudulent, and was sued out merely for the purpose of white-washing the bankrupt. If the result should show, however, that the petitioner was not a creditor, the Court will be unable to interfere upon the present petition; as I think it is bound by *Ex parte Hudson*. But I will give the matter the most careful investigation, and will also request the advice of my learned colleagues; after which I will mention the matter again.

His Honor this day stated to the counsel who were concerned in the petition, that he had mentioned the

March 17.

(a) Dict. per Sir G. Ross, in *Ex parte Taylor*, 2 Mont. & A. 37.

(b) 2 Russ. 456.

1835.

**Ex parte
JARMAN.**

facts of the case to the Chief Judge and Sir *G. Rose*; and that he was confirmed by them in his opinion, that the petitioner was not a creditor, on the ground of usury; and that he had therefore no right to present a petition for a supersedeas.

The ORDER was, that the petition should be dismissed; but without costs.

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*Gray's Inn Hall,
March 6, 1835.*

Ex parte OSBORNE.—In the matter of GUNNING.

A creditor, whose debt arises on a lost bill of exchange, issues a fiat, which he cannot support, in consequence of his inability to prove the loss of the bill, so as to let in satisfactory evidence of its contents; upon which the assignees obtain an order, that a renewed fiat may issue on the debt of another creditor: *Held*, that the petitioning creditor under the renewed fiat was not exonerated, under these circumstances, from making the payments of 10*l.* and 20*l.* to the Secretary of Bankrupts and the Accountant-General, under the provisions of the 45th and 46th sections of the Bankruptcy Court Act.

IN this case a fiat had been issued by a petitioning creditor, whose debt was founded on a bill of exchange; but the bill of exchange having been lost, and the assignees not having been able in an action at law to give satisfactory evidence of the loss, so as to let in secondary evidence of its contents, they could not substantiate a good petitioning creditor's debt; and they accordingly obtained an order, that a renewed fiat might issue on the debt of the present petitioner. The object of the present application was, that as the sum of 10*l.* had already been paid to the Secretary of Bankrupts by the first petitioning creditor, under the provisions of the Bankrupt Court Act, 1 & 2 *Will.* 4. c. 56. s. 45., as well as the sum of 20*l.* to the Accountant-General, under the provisions of the 46th section, that the present petitioner might be exonerated from making those payments again.

Mr. Swanston, in support of the application, referred

to the 45th and 46th sections of the act of 1 & 2 Will. 4. c. 56.; and said, it was reasonable that these fees should not be demanded a second time in the same bankruptcy. [*Erskine*, C. J. By the terms of the 45th section, "the sums to be so received by the said Secretary shall be by him paid once a week, or oftener, as the *Lord Chancellor* shall think fit to direct, into the Bank of England,"—"and all monies to be paid into the said account shall be subject to such general orders touching their payment in, investment, accounting for, and payment out of, such monies, for the purposes hereinafter provided, as the *Lord Chancellor* shall from time to time think fit to prescribe." Then, how can *this Court* interfere?] There are no words in either of those sections giving the Lord Chancellor exclusive jurisdiction for dealing with this fund,—or, if he has such jurisdiction, it is only as to the disposal of the fund. The petitioner in this case does not seek to touch the fund, but to be excused from paying fresh sums to increase it. If the Court thinks it has no jurisdiction under the 45th section, it is clear that it has jurisdiction under the 46th; for that applies to the bankrupt's estate to be administered in the Court of Bankruptcy. The payments, which are directed by the statute to be made out of the bankrupt's estate, have already been made; the estate, therefore, has already satisfied the exigency of the act. The first fiat was good and valid, and has merely been abandoned in consequence of accidental loss of the evidence of the petitioning creditor's debt. But whether the Court thinks it has jurisdiction, or not, it can at any rate make the order—as it does upon some occasions—subject to the approbation of the Lord Chancellor.

1835.

Ex parte
OSBORNE.

1835.

Ex parte
OSBORN.

ERSKINE, C. J.—It appears to me, that there is no colour for this application, on the merits of the case. The petitioning creditor takes out a fiat, and loses the bill of exchange, which was his evidence to support it. He might, if he pleased, have made it part of the records, by filing it with the proceedings; and not having done so, he must bear the consequence of his loss. How the loss was occasioned has not been satisfactorily explained, nor why secondary evidence could not have been given of the bill in question. Without determining the question of jurisdiction, therefore, I do not think that the Court is in any way called upon to interfere on the present occasion.

The rest of the Court concurring, the

Application was refused.

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Gray's Inn Hall,
March 6.

A reference ordered to the Commissioner, to inquire whether an arrangement, in regard to a portion of the bankrupt's property, which was approved of at a meeting of the creditors, would be beneficial to the estate.

Ex parte KIRBY.—In the matter of **POTTINGER.**

IN this case, the bankrupt, being possessed of the beneficial leases of two houses for the term of seventy-seven years, assigned them, with other premises, to *M.* and *J. Barber*, in trust for the benefit of his wife and children, and afterwards underleased one of the houses to *Critchell* for seventy-four years; to which lease, however, *M.* and *J. Barber* were not parties. The assignees under the bankruptcy had seized all the premises, except the house leased to *Critchell*, which occasioned a good deal of controversy between them and the trustees. To avoid litigation and expense, therefore, the

assignees called a meeting of the creditors, which was duly advertised in the Gazette, to assent to or dissent from a proposal that had been made for the assignees releasing a part of the premises to the trustees, on condition that the latter should release to the assignees the remainder. A meeting was accordingly held; and it was agreed by the major part in value of the creditors then present, being one-third in value of all who had proved, that it would be for the interest of the estate, that the proposal should be carried into effect.

This petition was therefore presented by the assignees, praying that they might be permitted to carry the resolution into effect, or for a reference to the Commissioner to inquire whether it would be beneficial to the general body of the creditors.

Mr. Montagu appeared in support of the petition.

The COURT ordered it to be referred to the Commissioner, to inquire and report whether the arrangement in question would be beneficial to the estate.

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Ex parte ABRAM.—In the matter of DUNNA.

*Gray's Inn Hall,
March 6.*

THIS was the petition of the petitioning creditor, praying that the assignees might be ordered to pay him his costs up to the choice of assignees, as taxed by the Commissioner.

Mr. Swanston was in support of the petition.

Although the petitioning creditor is not entitled to an order on the assignees to pay the amount of his costs, before they have received money under the fiat, he is nevertheless

entitled to an inquiry, whether any assets have been received by the assignees.

1835.

Ex parte
KIRBY.

1885.

Ex parte
ARRANG.

Mr. *Dixon*, for the assignees. The only ground on which this petition can be supported is, that the assignees have sufficient assets to pay the petitioning creditor his costs. Now, although he swears that various effects of the bankrupt's had been got in by the assignees, they swear in answer, that these effects have not been turned into money.

ERSKINE, C. J.—It is very true, that the assignees must have received *money* from the produce of the bankrupt's effects, before we can make an order upon them to pay the petitioning creditor. For the act directs the assignees to reimburse the petitioning creditor his costs, "out of the first *money* that shall be got in under the commission (a)." But the petitioning creditor is entitled to an inquiry, whether any assets have been yet received.

Sir J. Cross.—The assignees have not ventured to swear, that the value of the effects got in by them is not sufficient to pay the petitioning creditor his costs. There must be, therefore, an inquiry to ascertain that fact.

Sir G. Rose concurred.

Ordered, that it should be referred to the Registrar, to inquire and report whether the assignees had received any, and what assets, belonging to the bankrupt's estate.

(a) 6 G. 4. c. 16. s. 14.

1835.

Ex parte HAYNE.—In the matter of JACOBS.

Gray's Inn Hall,
March 6.

THIS was the petition of a creditor, who had proved a debt under the fiat, to be permitted to substitute it in lieu of the petitioning creditor's debt, under the provisions of the 6 G. 4. c. 16. s. 18.

On a petition for the substitution of a debt, in lieu of the petitioning creditor's debt, under the 6 G. 4. c. 16. s. 18., the costs of the proceeding must be paid by the petitioning creditor, and not out of the bankrupt's estate.

Mr. *Montagu*, in support of the petition. The petitioning creditor was unable to establish his debt, and the present petitioner has proved one to the amount of 503*l.*, incurred not anterior to the debt of the petitioning creditor. [Sir *G. Rose*. How do you propose to have the costs paid?] Out of the estate. [Sir *G. Rose*. That cannot be.] [*Erskine*, C. J. The proper order is, that the costs shall be paid by the first petitioning creditor.] If we cannot get them from him, they ought to be paid out of the estate; for it is for the benefit of the estate, that the fiat should be proceeded with; and the petitioning creditor has absconded.

ERSKINE, C. J.—If you cannot get the costs from the first petitioning creditor, you must make your election, whether you will go on with the fiat at your own expense, as to the substitution of the debt.

Ordered, that the debt of the petitioner should be substituted for that of the petitioning creditor, and that the costs occasioned thereby should be paid by the petitioning creditor.

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1835.

*Gray's Inn Hall,
March 7.*

Ex parte FREEMAN.—In the matter of CLAY.

On petition by assignees to expunge a proof, the examination of the bankrupt before the Commissioner, taken at the time the proof was admitted, is receivable in evidence.

THIS was a petition by assignees, to expunge the proof of a debt.

Mr. *Swanston*, and Mr. *Montagu*, in support of the petition, proposed to read an examination of the bankrupt before the Commissioner, which was taken when the proof was made.

Mr. *Barber*, and Mr. *Archbold*, for the creditor, objected to the examination being read, as the bankrupt was not now in Court for the purpose of *vivâ voce* examination.

ERSKINE, C. J.—The assignees are bound to show on this petition, that the evidence before the Commissioner did not justify the admission of the proof; as they now seek to impugn it. And I think, therefore, that they are entitled to read the depositions, upon which the Commissioner acted when the proof was admitted.

Sir J. CROSS,—who was first disposed to differ in opinion with the Chief Judge, under a misapprehension that the examination in question had been taken behind the back of the creditor, after the proof had been admitted,—now said, that he agreed with the rest of the Court, that the examination might be read; as it was taken previous to the proof being admitted, and it appeared that the creditor had then due notice of what the bankrupt had sworn.

Sir G. ROSE concurring,

1835.

Ex parte
FREEMAN.

The examination was received; but the petition, which involved entirely a question of fact, was finally dismissed with costs.

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Ex parte REBECCA MASSEY and others.—In the matter
of the Hon. G. L. MASSEY.

Gray's Inn Hall,
March 17.

THIS was the petition of the bankrupt's wife, and of the trustees under her marriage settlement, presented under the following circumstances:

In the year 1831, Mrs. *Massey* (who was then Mrs. *Cann*, a widow,) procured a lease of a dwelling-house on the Marine Parade at Brighton, called the Clarence Mansion, and completely fitted up and furnished it, at an expense of 12,000*l*. In August 1831 it was opened as a family hotel, and various persons lodged and boarded there. In November 1832 Mrs. *Massey* married the bankrupt; but previous to the marriage a deed of settlement was entered into between the bankrupt of the first part, Mrs. *Massey* (then Mrs. *Cann*) of the second part, and *T. Morgan* and *W. Montriau* of the third part; by which, after reciting the intended marriage, and that it was agreed that Mrs. *Massey* should, so far as regarded her present and future property, be deemed and taken to have and enjoy all the rights and privileges of a *fême sole*, notwithstanding her intended coverture, and that her property was of a personal nature, consisting principally of the furniture, household goods, plate, linen, china, wines, liquors, and other

By the terms of a settlement made previous to the bankrupt's marriage, all the property of his intended wife was vested in trustees for her separate use, and she was to have all the rights and privileges of a *fême sole*. This property consisted of a hotel and furniture at Brighton, the business of which was conducted entirely by the wife, the bankrupt never living at the hotel, nor in any way interfering in the management of it:—*Held*, that this property was not in the reputed ownership of the bankrupt.

1835.

Ex parte
Massey
and others.

effects in the Clarence Mansion, it was declared, that in case the marriage took effect, Mrs. *Massey* should be deemed and taken to be a single unmarried person, so far as concerned all property, to which she then was, or during her intended coverture might become, entitled, of whatever nature, quality, or kind soever; and should and might have, use, exercise, and enjoy, as far as concerned such property, all the rights, privileges, and powers of a single unmarried woman, as fully and effectually, to all intents and purposes, as she would or might have done in case the marriage had not taken effect, and she had continued unmarried; and in particular, that she should, notwithstanding her coverture, use, continue, and carry on the business of the Clarence Mansion, as she had theretofore done, and then did, for her own exclusive benefit and advantage, she duly satisfying and discharging, by and out of her said property, all debts, contracts, liabilities, and obligations, which might be incurred or entered into by reason of the said business, and therefrom saving harmless and keeping indemnified the said *G. L. Massey* and his estate and effects. And Mr. *Massey* thereby covenanted to do all necessary acts and deeds to vest the premises in *Morgan* and *Montrieu*, as trustees, for the separate use of Mrs. *Massey*.

After the marriage took effect, the hotel continued to be conducted, as before, up to the 6th March 1833, the bankrupt and his wife residing at Roehampton.

The fiat issued on the 9th September 1834, and the assignees had taken possession of all the fixtures, furniture, wines, and effects in the Clarence Mansion, insisting that the same had passed to them under the bankruptcy of Mr. *Massey*.

The prayer was, that the assignees might be ordered to deliver up this property to Mrs. *Massey*, or her trustees, in pursuance of the trusts of the settlement, and might also render an account.

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In answer to the statement contained in the petition, there were several affidavits filed on the part of the assignees, which alleged that the bankrupt had made advances for the payment of various debts, that had been incurred in respect of the Clarence Mansion. But it also appeared, that the bankrupt had received various sums from time to time from Mrs. *Massey*, or from one or the other of the trustees.

Mr. *Swanston*, and Mr. *Koe*, were in support of the petition. It appears from the affidavits which have been filed in behalf of the petitioners, that the business of the hotel was carried on entirely by Mrs. *Massey*, and that the bankrupt never appeared in any way as the owner. Mrs. *Massey* did not wish that her own name should appear in the concern; for it was carried on before her marriage in the name of Mrs. *Wells*, as well as after the marriage; the name of *Wells* appearing distinctly on the door. Nor does it appear, that Mr. *Massey* contributed in any way to the expenses of the business. At the time of his marriage with the petitioner, he was possessed of no property whatever, except 100*l.*, and two policies of assurance on the life of Lady *Clarina* for 1500*l.*, in which he had a life interest. The adjudication of the bankruptcy must have proceeded, on the ground that the wife was in this case the husband's agent, and that he was therefore to be considered a trader within the bankrupt

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laws. It is settled by *Jarman v. Woolloton* (a), and *Haselinton v. Gill* (b), that a woman may before marriage, with the consent of her intended husband, convey all her stock in trade and furniture to trustees, to enable her to carry on her business separately; and if the husband do not intermeddle with them, and there be no fraud, such effects, though fluctuating, are not liable for his debts. So where a bankrupt is in possession of furniture, under the trusts of a will or deed of settlement, it has been decided, that it was not to be considered as within his order and disposition at the time of his bankruptcy; *Ex parte Martin* (c), *Ex parte Horwood* (d). In the present case, the husband acquired no false credit with the world, from this business carried on by his wife. [*Erskine*, C. J. You must make out, that the possession of the wife was the possession of the trustees under her settlement. It would seem, from what has been already stated, that the possession was in a double character.] Whether the wife carried on the business in conjunction with, or independently of, the trustees, appears to be wholly immaterial. It is competent for the husband to contract on his marriage, that his wife may carry on a separate trade; and it is a matter of no importance, whether the husband carries on another trade or not. No question of order and disposition has been attempted to be raised in this case; for the husband never interfered in the slightest degree with the property. The business, as well as all the furniture and effects for carrying it on, were indisputably purchased

(a) 3 T. R. 618.

(b) Id. 620, note (a).

(c) 2 Rose, 331.

(d) Mont. & M. 169.

with the wife's property, and not a single creditor lent the husband a shilling on the credit of it.

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Mr. *Montagu*, and Mr. *Ching*, for the assignees. It is not denied, that, where there is a trust, the wife's property is not liable to the debts of the husband; but then the possession of the property must be consistent with the ownership. For where a trustee for a married woman permits her husband to take possession of the trust property, and to become the reputed owner to all the world, he may lose the goods, if the husband becomes a bankrupt. This doctrine was recognized by Lord C. J. *Eyre*, in *Lingham v. Biggs* (a). The trustees in this case never exercised the slightest control over the property, but left every thing to the management of the wife. [*Erskine* C. J. Although the wife might be the husband's agent, as far as regarded the trade, yet she might also be considered as the agent of the trustees as regarded the furniture.] It is very clear, from the case of *Darley v. Smith* (b), that to exempt trust property from the claims of the husband's creditors, in case of his bankruptcy, the possession of it must be consistent with the deed. [*Erskine* C. J. In that case the possession of the furniture was wholly inconsistent with the trust.] And, therefore, it was held to be fraudulent. The same doctrine was laid down, also, in *Ex parte Martin* (c), and *Haselinton v. Gill* (d). By the terms of the marriage settlement, in the present case, Mrs. *Massey* engaged to satisfy and discharge out of her own property

(a) 1 Bos. & Pul. 88.

(b) 8 T. R. 82.

(c) 2 Rose, 331; 19 Ves. 491.

(d) 3 T. R. 620, note (a).

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all debts which might be incurred by carrying on the business of the Clarence Mansion, and to save harmless and keep indemnified Mr. *Massey* from any payment in respect of such debts. Now, it appears from the affidavits filed on behalf of the respondents, that Mrs. *Massey* was unable to pay the whole of these debts, and that they were in part paid with the sum of 1100*l.* raised by Mr. *Massey* on three bills of exchange which he had accepted. So that, at any rate, the assignees are entitled to an account of what sums have been paid by the bankrupt, or by Mrs. *Massey*, in discharge of the debts incurred in respect of the business of the Clarence Mansion.

Mr. *Swanston*, in reply, was stopped by the Court.

ERSKINE C. J.—If the property in this case had been in the possession of the bankrupt, instead of that of the wife, it would then have been inconsistent with the terms of the deed of settlement, and must therefore have been considered to be in his reputed ownership, within the meaning of the bankrupt act. But so far from being in his possession, he never lived at the Clarence Mansion, nor in any way interfered in the management of it; his creditors, therefore, cannot have been deceived by the belief that he was the owner of it. On the contrary, it appears to have been uninterruptedly, from the time of the marriage, under the exclusive control and management of the wife. The possession, therefore, in this case was perfectly consistent with the deed. All that the husband did,—even according to the statement on behalf of the assign-

nees,—was to make certain advances towards the payment of the expenses. If the bankrupt's creditors, therefore, are protected from all liability in respect of the debts incurred by the business of the Clarence Mansion, and are indemnified from loss by reason of any payments made by the bankrupt, they cannot require more.

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Sir J. CROSS.—I am entirely of the same opinion; but I think that the creditors of the bankrupt are entitled to an indemnity from any liabilities, which may have been entered into by the bankrupt in respect of this establishment.

Sir G. ROSE.—I also concur in the opinion expressed by his Honor the Chief Judge, that the possession in this case was strictly consistent with the trusts of the deed.

The ORDER was, that the property in the petition mentioned should be applied in satisfaction and discharge of all debts, contracts, liabilities, and obligations incurred, or entered into, by reason of the business in the settlement, and in the petition mentioned, and the advances beyond these, if any, made by the bankrupt on account of such business; that the estate of the bankrupt was entitled to be saved harmless and indemnified therefrom; that subject thereto, the petitioners were entitled to the property in the petition mentioned; and that if any inquiry or account should be necessary, to ascertain what liabilities the bankrupt had entered into, it should

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be referred to the Deputy Registrar to prosecute such inquiry and take such account; that the costs should be reserved; and that either party should have liberty to apply.

Ex parte ROBERT WAITHMAN.—In re RICHARD MEE
 RAIKES.

Gray's Inn Hall,
 March 17.

The bankrupt, being one of the directors of a life assurance office, deposits a policy of that office with his bankers, as a collateral security for advances,—one of the bankers being also one of the auditors of the assurance office. Held, that this was sufficient notice to the office of the transfer of the bankrupt's interest in the policy, to prevent the claim of reputed ownership.

THIS was the petition of the official assignee, praying that a former order of the Court might be in part discharged, which was obtained under the following circumstances.

The bankrupt, being largely indebted to his bankers, Messrs. *Williams Deacon & Co.*, had deposited with them various securities, among which was a policy of assurance of the Guardian Assurance Company for the sum of 1000*l.* on the life of one *George Leyburn*. Messrs. *Williams & Co.* had obtained an order for the sale of this policy, together with the other securities held by them, directing that the proceeds of the sale should be applied in payment of a certain portion of their debt, and that they might prove for the residue. It appeared, that the bankrupt was one of the directors of the Guardian Assurance Company, and that *Williams Deacon & Co.* were proprietors of shares in that company,—*Robert Williams*, one of the partners, being also one of the auditors. Messrs. *Williams & Co.* had consequently thought it unnecessary to give any formal notice to the Guardian Assurance Office of their claim to the policy.

The petition prayed, that so much of the former order of the Court as related to this policy of assurance might be discharged, and that the policy, or the produce thereof, might be declared to be part of the bankrupt's estate, and be delivered up by *Williams & Co.* to the petitioner.

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Mr. *Montagu*, in support of the petition. The question is, whether due notice was given by the bankers to the insurance office of their interest in this policy. It is very true, that one of the holders of the policy was an auditor of the company; but it does not follow, that the notice, which he had in his character of creditor, would constitute a sufficient notice to the company. The petition has been presented by the direction of the Commissioner, who wished the opinion of the Court to be taken on the point.

Mr. *Swanston*, and Mr. *J. Russell*, for the respondents, were stopped by the Court.

ERSKINE, C. J.—I am of opinion, that there is sufficient evidence of the fact of the office having had notice of the claim of Messrs. *Williams Deacon & Co.* to the policy in question. It was superfluous to give a specific and formal notice, when one of the directors, and the auditor of the company, were both cognizant of the fact.

Sir J. CROSS.—It is incumbent, on the part of the petitioner, to make out that the bankrupt was the reputed owner of this policy; but there is not the

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Sir G. ROSE concurred.

Petition dismissed; the costs of both parties to be paid out of the estate. (a)

(a) See *Carbis v. Croggon*, ante, 354; and *Ex parte Burbidge*, re *Kidder*, post.

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Ex parte WILLIAM MILLER CHRISTY and others.—In the matter of THOMAS BARROW and GEORGE GEDDES.

Gray's Inn Hall,
March 17.

Where the petitioning creditor's bill, after being taxed by the Commissioners, had been paid, and the assignees' accounts had been audited, for the space of six years, the Court refused to order a re-taxation of it by the Registrar.

It is a matter of course for any creditor, who has proved to the amount of 20*l.*, to apply within a reasonable time, under the 14th section of 6 Geo. 4.

c. 16, for a re-taxation of any bill of the solicitor to the commission; but not

THIS was the petition of certain creditors, who had proved under the commission, for the re-taxation of the bills of costs of Messrs. *Hadfield & Grave*, the solicitors to the commission.

The bankrupts were commission agents at Manchester, and the commission issued against them on the 17th September 1828. The bills of costs now sought to be taxed amounted in the whole to no less a sum than 6400*l.* 17*s.* 8*d.*, which was comprised in forty separate bills; some of which had been taxed by the Commissioners, and the rest by the Master of the Court of King's Bench, and had been afterwards allowed by the Commissioners; but none of the bills had been taxed by a Master in Chancery, or by an officer of the Court of Review. The bill of costs for prosecuting the commission up to the choice of assignees amounted to 266*l.* 17*s.* 10*d.*, in which was contained

where a period of three years has been suffered to elapse after payment of such bill.

But where the creditor applies to the general jurisdiction of the Court, and points out objectionable items, the Court will then refer the bill to its proper officer, to review the former taxation.

Where, however, a bill has been already taxed by the proper officer of the Court in which the business has been done, the Court of Review will not in such case disturb the taxation.

What are objectionable items in the solicitor's bill for business connected with the meetings of the Commissioners.

the charges for superseding two former commissions, and for a journey to the Lord Chancellor in the country, for the purpose of opening the seal,—for which, it was alleged in the petition, there was no necessity. There were also charges for general retainers to seven different counsel.

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Another bill was for general business done after the choice of assignees, and amounted to 443*l.* 12*s.* 8*d.*, in which were contained the following items:—20*l.* for other retainers to counsel—60*l.* for preparing two cases for counsel's opinion, and a consultation thereon, relative to a dispute between the assignees and one *Robert Anderton*, and for the solicitor's journey to London on the subject—10*s.* for preparing each memorandum of the Commissioners at their meetings, in addition to the usual charge of 1*l.* for the solicitor's attendance, and in many instances a charge of 1 guinea for two clerks' attendance—23*l.* 18*s.* 4*d.* for seven copies of inventory, to annex to notices of demand served on the petitioners; which were alleged to be wholly unnecessary—10*l.* 7*s.* 8*d.* for the messenger taking possession of premises belonging to one *Johnson*—9*l.* for a fresh assignment to the assignees—and 9*l.* 6*s.* for drawing a fair copy of the bill of costs.

Several other bills of costs related to certain proceedings pending between the assignees and *Robert Anderton*, amounting in the whole to 530*l.* 17*s.* 10*d.*, which last bill of costs had been also taxed and allowed by the Commissioners, although the award of the arbitrator, to whom all matters in difference between the parties had been referred, directed that the costs of such proceedings should be taxed according to the course and practice of the Court of Chancery, or by the proper officer of the Court. The objectionable items in

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these last-mentioned bills were the following:—135*l.* for briefs and fees to four counsel—13*l.* 13*s.* 4*d.* for copies of documents for the use of the solicitors in the country, and the agents in London.

Another bill was for general business alleged to have been done by the solicitors for the bankrupt's estate, which had been taxed and allowed by the Commissioners at 196*l.* 6*s.* 10*d.*, and which contained the following objectionable items:—28*l.* for briefs to counsel—8*l.* 0*s.* 6*d.* for taxing the bill—and 26*l.* for counsels' fees.

Another bill amounted to 347*l.* 17*s.* 1*d.*, and contained the following items:—Briefing, and making brief copy of Mr. *Lloyd's* opening speech for adjourned meeting, six sheets, 1*l.* 10*s.*—Fee to Mr. *Lloyd* to attend, 3*l.* 5*s.* 6*d.*—Attending him, 6*s.* 8*d.*—Clerks' attendance at meeting, 10*s.* 6*d.*—Memorandum of adjournment till to-morrow and copy, 10*s.*—Refresher to Mr. *Lloyd* and clerk, 3*l.* 5*s.* 6*d.*—Attending him, 6*s.* 8*d.*—Instructions for further brief, 6*s.* 8*d.*—Making fair copy of evidence taken this day for counsel, seven sheets, 1*l.* 3*s.* 4*d.*—Fee to Mr. *Lloyd* and clerk, with further brief, 2*l.* 4*s.* 6*d.*—Attending him, 6*s.* 8*d.*—Paid tavern bill for witnesses' expenses on the 30th January, 1st February, and this day, 5*l.* 11*s.* 6*d.*—Memorandum of adjournment meeting, 10*s.* 28th March, Instructions for further brief, 6*s.* 8*d.*—Making fair copy of evidence taken on 23d February, seven sheets, 1*l.* 3*s.* 4*d.* 29th, Two clerks' attendance 1*l.* 1*s.*—Memorandum of adjournment from two till three o'clock, 10*s.*—Refresher to Mr. *Lloyd* and clerk, 3*l.* 5*s.* 6*d.*—Attending him, 6*s.* 8*d.*—Commissioners and solicitors' fees, 6*l.*—Two clerks' attendance, 1*l.* 1*s.*—Room, &c., 7*s.* 6*d.*—Memorandum of adjournment till to-morrow, and copy, 10*s.*—Instructions for further brief, 6*s.* 8*d.*—Making fair

copy of evidence for counsel, eleven sheets, 1*l.* 16*s.* 8*d.* 30th, Two clerks' attendance, 1*l.* 1*s.*—Memorandum of adjournment from two till three o'clock, and copy, 10*s.*—Refresher to Mr. *Lloyd* and clerk, 3*l.* 5*s.* 6*d.*—Attending him, 6*s.* 8*d.*—Summoning Commissioners to adjourned meeting in the afternoon, 10*s.*—Commissioners and solicitors' fees, 6*l.*—Two clerks' attendance, 1*l.* 1*s.*—Room, 7*s.* 6*d.* It was alleged, that this last-mentioned bill contained charges to the amount of 26*l.* and upwards, for instructions for briefs and briefing evidence at meetings, and charges for summoning Commissioners in cases where two or three meetings were held on the same day; and that in some instances an interval of only one hour elapsed between such meetings. The following items, among others, were also objected to:—Mr. *Lloyd* having stated that he could not attend the adjourned meeting for further consideration of *Christy & Co.*'s proof, but that he would make his observations on the case, and we might argue them, Revising and considering such observations, 13*s.* 4*d.*—Copy thereof, nine sheets, 1*l.* 10*s.*—Fee to Mr. *Lloyd* and clerk drawing same, 2*l.* 4*s.* 6*d.*—Attending him, 6*s.* 8*d.* There were also various charges in the bill, to a large amount, for tavern expenses for the entertainment of witnesses, in addition to large sums alleged to have been paid to them for their loss of time and expenses.

Some others of the bills of costs, which had been taxed by the Master of the Court of King's Bench, related to two actions at law, brought by the assignees against the Sheriff of Cheshire and the petitioners, to try their right to certain property which the petitioners had taken in execution upon a judgment obtained by them against the bankrupts. In the first of these actions the assignees were nonsuited,

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but in the second they recovered a verdict. It was alleged, however, that the same right was to be tried in both actions, and that all the facts, circumstances, documents, and evidence in both actions were also precisely the same. The bill of costs, as delivered in the second action against the petitioners, amounted to the sum of 746*l.* 6*s.* 3*d.*, but was reduced, on taxation by the Master of the Court of King's Bench, to 622*l.* 1*s.* 6*d.*, the sum of 124*l.* 4*s.* 9*d.* having been taxed off. Amongst the different items allowed in this last-mentioned bill were the following:—Instructions for brief, forty witnesses and 130 sheets, 2*l.* 2*s.*—Drawing same, 130 sheets, say 100, 33*l.* 6*s.* 8*d.*—Making four copies, 130 sheets, say 120, 60*l.*—Four fair copies of special notice to produce, fol. 25 each, to annex to briefs, 1*l.* 5*s.*—Four fair copies of examination of defendants *Winterbottom* and *Sampson Lloyd* on 14th October 1828, 8 sheets, 3*l.* 13*s.* 4*d.*—Four copies of examination of defendant *Sampson Lloyd* on 21st July 1831, 3½ sheets each, 1*l.* 16*s.* 8*d.*—Four fair copies of letters and documents to accompany briefs, 13 sheets each, say 10 sheets, as allowed by Mr. *Le Blanc*, 5*l.*—Four fair copies of documents relating to deposits made by the bankrupts with *Robert Anderton*, 3 sheets each, 1*l.* 10*s.*—Drawing abstract of deed of assignment, being the act of bankruptcy committed by *Geddes* on 10th October 1827, 12 sheets, say 10, as allowed, 2*l.*—Four fair copies of same, to accompany briefs, 5*l.* The amount of this last bill was duly paid by the petitioners to Messrs. *Hadfield* and *Grave*.

The bill for the costs incurred by the assignees in the first action commenced by them against the Sheriff of Cheshire amounted to the sum of

1127*l.* 16*s.* 6*d.*, and had been taxed and allowed by the Master of the Court of King's Bench at 1058*l.* 16*s.* 2*d.* Amongst the various items contained in this bill, there were charges for drawing and copying briefs, abstracts, documents, and other evidence to accompany briefs, to the amount of upwards of 200*l.*—For counsel's fees and retainers, upwards of 300*l.*—For a journey to London by Mr. *Hadfield* as solicitor, and Mr. *W. Grave* as a witness, and of Mr. *Hadfield*, to hear the argument on moving to set aside the nonsuit, upwards of 120*l.*

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In addition to these various bills, amounting in the whole to 6400*l.* 17*s.* 8*d.*, which had been allowed by the Commissioners, the Commissioners, on the audit of the accounts of the assignees, also allowed the solicitors the following sums:—

	£.	s.	d.
Separate estate of <i>Geddes</i> . Mr. <i>Knight</i> , for witnesses' expenses to London	232	9	0
Joint estate. <i>Henry</i> , for witnesses	57	1	3
Separate estate. Ditto	57	1	3
	114	2	6
Joint estate. Star Inn tavern bill, on arbitration	18	12	7½
Separate estate. Ditto	6	4	2½
	24	16	10
Joint estate. Assignees' expenses to London, on arbitration	12	8	0
Separate estate. Ditto	37	4	0
	49	12	0
Separate estate. Assignees' expenses, to attend trial against <i>Massey</i> and others, in London	40	0	0
Paid <i>Miller</i> , <i>Warburton</i> , <i>Hendey</i> , <i>Bellingham</i> , and <i>Gibbons</i>	10	19	0
<i>Downs</i>	5	0	0

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The petitioners alleged, that many of the improper charges contained in these bills of costs, which had been allowed by the Commissioners, were charges in which the Commissioners themselves were interested.

They prayed, therefore, that the bills of costs so taxed and settled by the Commissioners might be referred to one of the Registrars, in order to review such taxation; that the bills taxed by the Master of the Court of King's Bench might also be referred back to him, to review his taxation; that Messrs. *Hadfield* and *Grave* might account for such sums of money as they had received or retained on account of the bankrupts' estate, or of such bills of costs respectively, and that they might be directed to pay to the assignees, for the benefit of the petitioners and the other creditors of the bankrupts, what, if any thing, should appear to be due on the balance of such account, after allowing them thereout such sum as should appear to be due to them upon taxation; that Messrs. *Hadfield* and *Grave* might be ordered to deposit with the proper officer of the Court all their said bills of costs, which had been either taxed, settled, or allowed by the Commissioners, or the Master of the Court of King's Bench,—and that the petitioners might be at liberty to take copies of the same, or of such parts as they should be advised; and that Messrs. *Hadfield* and *Grave* might be ordered to pay the costs of this application, and of such taxation, or that the costs might be reserved, until after the taxation should have taken place.

Mr. *Twiss*, and Mr. *Keene*, appeared in support of the petition. Whenever objectionable items are pointed out in the petition, the solicitor's bills may be ordered to be taxed, notwithstanding they have been allowed by

the Commissioners, or even paid by the assignees; *Ex parte Jourdain* (a). In the present case the bills have been negligently taxed by the Commissioners, and various charges have been allowed, which ought to have been disallowed. The only difference between this case and *Ex parte Jourdain* is, that in the present case two of the bills, which were for the costs of the actions at law, were taxed by the Master of the Court of King's Bench. [*Erskine*, C. J. It appears that the assignees' accounts were audited, and the petitioning creditor's bill paid no less than six years ago. I think therefore, at this distance of time, that the petitioners are bound by that payment; as they ought to have objected to it on the audit of the assignees' accounts.] We will then proceed with the second bill for 443*l.* 12*s.* 8*d.*, which is for business done since the choice of assignees. After commenting on some of the items in this bill, the Court then called on

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Mr. *Swanston*, and Mr. *Anderdon*, for the respondents. A state of litigation, which lasted four years, ensued between the assignees and various creditors, on the ground of fraudulent preference. The petitioners in this case were the creditors insisting on the fraudulent preference, maintaining it by vexation for a length of time, and obtaining a nonsuit in the first action brought against them on a mere technical point, the costs of which form an item in the bill now sought to be taxed. The present petition is nothing more than a vindictive proceeding by creditors, who have been defeated of their claims. The amount of the bills was paid three years ago; and, more than two years since, they called for an

(a) 3 Deac. & Ch. 637.

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inspection of these bills, which was not refused; but, on the contrary, they had every facility afforded them. The former taxation of the bills was attended by some individuals who are now dead, and some of the documents and vouchers may now also be lost. The petitioners proved their debt in March 1832; so that they need not have waited near three years to present this petition; which petition also is not under the 14th section of the 6 Geo. 4, c. 16, but to the general jurisdiction of the Court. [*Erskine*, C. J. We will take it then under the general jurisdiction.] The Court will distinguish between what are the charges of the solicitor, and what are the disbursements of the assignees. To entitle a party to the re-taxation of a bill of costs, there must either be an allegation of fraud, or the charges must be so gross as to imply fraud. The amount of the bill is not a criterion of improper charges; that only shows the quantity of the business done.

Mr. Parker appeared for the assignees.

ERSKINE, C. J.—It seems to me quite unimportant, whether this petition is presented under the 14th section of the act of parliament, or under the general jurisdiction of the Court. If it is presented under the 14th section, it would be quite a matter of course for any creditor who had proved to the amount of 20*l.* or upwards, and who is dissatisfied with the taxation of the bill by the Commissioners, to apply for a re-taxation of it in a reasonable time. But I think it would be too strong a proceeding, in the present instance, after the time that has elapsed, and the payment of the bill, to order the re-taxation of it, as a mat-

ter of course, under that section. But if a party appeals to the general jurisdiction of the Court, and points out objectionable items in a bill, which he applies to have re-taxed, I think he ought to be allowed to have it re-taxed by the proper officer of the Court.

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Sir J. Cross.—There appears to be some misapprehension, as to the lapse of time that has arisen since this bill was formerly taxed. The petitioners have only proved their debt within the last three years, and it does not appear at what period within that time they first came to the knowledge of these different bills, in which it would certainly require some further time to enable them to discover all the objectionable items. From the wording of the 14th section, the taxation is directed as between the solicitor and the estate; and that seems a sufficient warrant for the petitioners in presenting this petition. The bills had been taxed some time before the petitioners became creditors under the commission, and therefore before they had any power of applying to this Court. This bill ought certainly to be referred for re-taxation.

Sir G. Rose concurred.

Mr. Twiss, and Mr. Keene, then proceeded to comment on the items in the bill for 34*l.* 17*s.* 1*d.*, objecting to the charge of 1*l.* 10*s.* for a copy of Mr. Lloyd's speech at the opening of the commission, to the charges of fees for frequent adjournments from two to three o'clock of the same day, of 10*s.* for drawing each memorandum of adjournment, and of 2*l.* 4*s.* 6*d.* to Mr. Lloyd for the draft of his intended speech at one of

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the adjourned meetings, which he could not personally attend.

Mr. *Swanston*, and Mr. *Anderdon*, *contrà*, pursued the same line of argument which they had before urged, against the re-taxation of this bill.

ERSKINE, C. J.—I think there has been quite enough shown for us to refer it to the Deputy Registrar to examine this bill, and say whether these charges ought to be allowed, or not.

Sir J. CROSS.—The charge for two meetings in the same day, for summoning the Commissioners to the adjourned meeting in the afternoon, for making copies of each memorandum of adjournment, and for the attendance of two clerks at each meeting, seem to be such charges as call upon us to order this bill to be re-taxed.

Mr. *Twiss* then proceeded to comment on one of the other bills, in which the sum of 135*l.* was charged for four counsel attending the arbitrator, to whom one of the causes was referred ; when

Mr. *Swanston*, and Mr. *Anderdon*, consenting to the same order being made with respect to this and the other bills, which had been pronounced in regard to the former ones,

The Court made the following Order:—That so much of the petition, as sought to tax the petitioning creditor's bill up to the choice of

assignees, should be dismissed with costs ; that the rest of the petition, as against the assignees, should be also dismissed with costs, reserving the question however by whom these costs are ultimately to be paid ; that it be referred to the Deputy Registrar to tax the several other bills of costs, for business done subsequently to the choice of assignees, not disturbing such bills as had been taxed by the officer of the Court in which such business had been done ; and if, in taxing such bills, it should appear to the Deputy Registrar to be necessary to submit any matter to the consideration of the Commissioner, he was to be at liberty to do so, at the request of either party ; that Messrs. *Hadfield* and *Grave* should forthwith deposit with the Deputy Registrar, all their bills of costs for business done under the commission, except the bill up to the choice of assignees, with liberty for the petitioners to take copies of the same ; that Messrs. *Hadfield* and *Grave*, and all other proper parties, should be examined upon oath before the Deputy Registrar upon interrogatories or otherwise, as he might think fit, and should produce all books, papers, and writings relating to the bills so referred to him to be taxed, and account for all sums of money received by them on account of their bills under the commission ; that the proceedings under the commission should be deposited by the assignees with the Deputy Registrar, with liberty for the petitioners to inspect them, giving reasonable notice for that purpose, and to take copies or extracts therefrom, touching the matters in

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question ; and that further directions and costs should be reserved, until the Deputy Registrar should have made his certificate ; with liberty for any of the parties to apply.

Ex parte THOMAS PARR, THOMAS LYON, EDWARD GREENALL, and JOHN GREENALL.—In the matter of JOHN ARTHUR BORRON.

Westminster,
April 28.

The bankrupt kept an account with A., B., and C., as bankers, who afterwards took into partnership the son of C.; after which, the bankrupt executed a legal mortgage to A., B., and C., for securing the repayment of the loan of 6000*l*. Subsequently to this, the bankrupt addressed a letter to Messrs. A., B., and C., authorizing them to consider all the securities they then held as responsible for any advances made, or to be made by them, to the bankrupt. Held, that this letter must be taken to have been addressed by the bankrupt to the four partners, and amounted to an equitable mortgage to the four, of the previous legal mortgage to the three, operating as a security for all the advances made either by the three, or the four partners.

THIS was a petition for the sale of certain securities, which had been deposited with the petitioners at various times, under the following circumstances. The three petitioners, *Thomas Parr*, *Thomas Lyon*, and *Edward Greenall*, for some time previous to the year 1825, carried on business in copartnership as bankers at Warrington, in Lancashire, and the bankrupt kept an account with them, which was entitled *J. A. Borron, Esq.*, in account with *Parr Lyon & Co.* In December 1825, the other petitioner, *John Greenall*, was admitted a partner from the previous annual day of settlement, which was on the 30th June 1825. In the early part of the year 1826, the bankrupt, being then indebted to the petitioners in the sum of 2500*l*. on his banking account, applied to them to advance him the sum of 6000*l*., which they consented to do out of the capital employed in their banking concern. In consideration of this loan, the bankrupt, by indentures bearing date the 15th and 16th February 1826, conveyed

in fee to the petitioners, *Thomas Parr*, *Thomas Lyon*, and *Edward Greenall*, his estate at Little Woolden, in the county of Lancaster, to secure the repayment of the said sum of 6000*l.* and interest, and at the same time a term of years was assigned to a trustee in trust for these three petitioners, and to attend the inheritance. This sum of 6000*l.* was kept distinct and separate from the several banking accounts which the bankrupt had with the petitioners; and the bankrupt was debited, in his separate account with them, merely with the interest on this sum as it became due. The bankrupt's original account was continued to be kept with all the petitioners up to the 4th January 1834, when the balance due from him was 584*l.* 7*s.* 5*d.* (but which had since been reduced to 579*l.* 2*s.* 1*d.*) exclusive of the above-mentioned sum of 6000*l.*

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On the 9th October 1826, the bankrupt deposited with the petitioners the title-deeds relating to certain other freehold property in Warrington, accompanied by the following letter.

" Dear *Parr*,

" Inclosed you will find two deeds relating to five houses in Haydock Street, annual rents 35*l.*, which I engage to convey to you and your partners, in case a balance of 200*l.*, advanced by you to *Philip Fryer*, jun. of Manchester, and my two sons, *W. G. Borron* and *Archibald Borron*, be not paid by them to you after two months notice. I am &c.

" *Thomas Parr*, Esq. Warrington. *J. A. Borron*."

On the 2d July 1829, the bankrupt signed and left with the petitioners the following memorandum:—

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" Gentlemen, Woolden, July 2, 1829.

" I hereby authorize you to consider all the securities you now hold of mine, real and personal, as responsible for any advances you have, or may make to myself, or for any deficiency that may arise in any partnership I am engaged in, so far as my own share is concerned in such partnerships. I am, &c.

" To Messrs. *Parr, Lyon*, and *J. A. Borron.*
Greenall, Warrington."

At this time the bankrupt, individually, had only one account with the petitioners, and the balance then due from him was about 1500*l*.

In July 1827, the bankrupt entered into partnership with *Henry Delves Broughton*, *James Sutton*, and *Hillebrant Meredith Parratt*, as makers of salt, at *Ander-ton*, in *Cheshire*, under the firm of *Borron & Co.*; which firm, on the 20th July in that year, first opened an account with the petitioners, which was regularly carried forward up to the 14th August 1833, when a balance was struck as due to *Parr Lyon & Co.* of 2493*l*. 14*s*. 8*d*., making, with the addition of interest to the 31st December 1833, the total due on that account 2541*l*. 4*s*. 3*d*.

On the 28th January 1830, *James Sutton* and *Henry Delves Broughton* ceased to be partners in the firm of *Borron & Co.*

On the 8th July 1833, the bankrupt and *Hillebrant Meredith Parratt* also agreed to dissolve partnership, as from the 30th June preceding; and in the articles of dissolution the bankrupt covenanted with *Parratt* to pay all the partnership debts and liabilities. On *Parratt's* retiring, *Arthur Borron* (eldest son of the bank-

rupt) entered into partnership with his father in the same concern; it being understood between themselves, but not known to the petitioners until the 15th August 1833, that each was to have one-half of the profits. The business, however, still continued to be carried on under the firm of *Borron & Co.*

On the 15th August 1833, a new account was opened by the petitioners with *Borron & Co.*, which was thus entitled: "Dr. *Borron & Co.*, in account with *Parr Lyon & Co.* Cr."; which account was continued until the 31st December 1833, when a balance of 829*l.* 8*s.* 0*d.* was found due from *Borron & Co.* to *Parr Lyon & Co.* The bankrupt was also a partner with *David Carruthers* and *Edward Garven*, in the Bank Quay Glass Company at Warrington, who had also an account with the petitioners; and this account was kept on foot until December 1833, when there was a balance due to the petitioners, but it was then nearly discharged. The bankrupt was likewise a partner with other firms, who kept banking accounts with the petitioners; but nothing was then due from them.

On the 11th June 1830, the bankrupt wrote to the petitioners as follows:

"Messrs. *Parr Lyon and Greenall.*

"Gentlemen,

"Having placed the deeds of certain property in your hands, as a security for monies advanced and to be advanced upon sundry accounts, I hereby request and authorize you to retain the said deeds as a security for the balance now owing, or that may be owing, by

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1835. the Bank Quay Glass Company, provided it does not
Ex parte exceed the sum of 4000*l.* I am, &c. *J. A. Borron.*"
Parr
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In the year 1825, the bankrupt became lessee of a large tract of moss land in Lancashire, called Chat-Moss, consisting of about 1121 acres, at the rent of 180*l.* 5*s.*, for the remainder of a term of 99 years; and on the 31st May 1825 he demised by indenture to *Thomas Chadwick*, for the residue of the term, about 32 acres, being part of the east portion of the moss, at the rent of 23*l.* 4*s.*, *Chadwick* executing a duplicate of the lease; which duplicate was on the 11th June 1830 deposited by the bankrupt with the petitioners, with the following memorandum:—

“ Messrs. *Parr Lyon and Greenall.*

“ Gentlemen, Warrington, 11th June 1830.

“ I herewith beg leave to deposit with you a counterpart lease of land, being part of Chat-Moss, dated 31st May 1825, for the purpose of securing you from loss by any advance you have now, or may hereafter make to me in my banking account already opened with you; and this security to be in addition to any others you may hold belonging to me; all of which I agree to convey to you by mortgage, whenever you may require it. I am, &c. *J. A. Borron.*”

This lease was afterwards given up by the petitioners to the bankrupt, in consequence of their having been informed by him, that he had contracted with *Chadwick* for the redemption or sale of the rent reserved by the lease. In 1832 the bankrupt entered into agreements in writing with four other persons, for leasing to them other portions of the western division

of the moss land, which was completely separated from the eastern division by intervening land. Duplicates of these agreements were respectively signed both by the bankrupt and the several tenants, one part being kept by the tenants, and the other part being kept by the bankrupt. On the 10th October 1832, the bankrupt deposited these four duplicates with the petitioners, accompanied with the following memorandum:—

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“ Messrs. *Parr Lyon & Co.*

“ Gentlemen,

“ I beg to deposit in your hands four several contracts for moss land to be leased to Mr. *Makinson*, Mr. *Furnival*, Mr. *Patchett*, and Mr. *Dudley Codrington*, which leases, when made out, I agree shall be placed in your hands as a security for the balance of my account with you. And I further agree to make over the said leases to you in any way that you may require. I am, &c.

J. A. Borron.”

In addition to these agreements, the bankrupt entered into three others of a similar nature, with persons of the name of *Magrath*, *Crowne*, and *Lees*, and in like manner from time to time deposited duplicates of them as securities with the petitioners. *Magrath*, soon after entering into the agreement, and without knowing that the bankrupt had deposited the duplicates of his agreement with the petitioners, purchased his rent from and paid the purchase money to the bankrupt; who never communicated that fact to the petitioners until the 9th January 1834, when he wrote them the following letter.

1835. "Messrs. *Parr Lyon* and *Greenall*.

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and others.

"Gentlemen, Woolden, January 9, 1834.

"I called in Manchester on Mr. *Makinson*, solicitor, some days ago, to execute the leases and hand them to you, but they were not ready. I send you an order below, and if I have the power will execute them; 300*l.* a year of these are pledged to you, with whom the contracts are lodged. There is one which I believed had been in my possession, viz. Mr. *Magrath's*, and which I should wished changed for any other of the same amount, viz. 28*l.* 5*s.*, as I have sold it to him.

"I am, &c. J. A. *Borron*.

"Please to assure me you will exchange Mr. *Magrath's*."

The order alluded to in this letter was as follows:

"Mr. *Makinson*,

"Please to deliver the leases to Messrs. *Parr Lyon* and *Greenall*, if ready for execution, on this order, which you have had so long orders to make out.

"January 9, 1834. Your's &c. J. A. *Borron*."

On the 4th May 1832 the bankrupt assigned, by way of mortgage, to *John Hutchinson* and *James Leigh*, the eastern division of Chat-Moss, which did not include any of the moss lands comprised in the above seven agreements, to secure 2500*l.* and interest; and at the time of the mortgage he delivered to the mortgagee the title-deeds which related to the whole of Chat-Moss, including both the eastern and western divisions.

On the 17th April 1833 the bankrupt applied to *James Brackenbury* for the loan of 1000*l.* on security

of the whole of the moss lands, including the eastern as well as the western portion; who, on ascertaining from the solicitor to the prior mortgagees, that he had no notice of any other incumbrances, and neither the deposit of the agreements, nor any other incumbrances being known to *Brackenbury*, he advanced the 1000*l.*, and took a legal assignment of all the moss lands, and all the rents arising therefrom, subject to the first mortgage. He then gave immediate notice thereof to the first mortgagees, and also to the tenants, to pay the rents to him. The assignees had paid off the first mortgage, and with the consent of *Brackenbury* obtained possession of the deeds, without prejudice to his mortgage, which was to stand on the same footing, as if the deeds remained with the first mortgagees.

On the 9th January 1834, a fiat was issued against the bankrupt.

The petition prayed, that the Commissioners might take an account of what was due for principal and interest in respect of these several securities; that such securities might be sold, or otherwise disposed of, and that the money arising from the sale might, after defraying the expenses of this petition and the sale, be applied in payment and satisfaction of what should be found due to the petitioners for principal, interest, and costs, and that the surplus, if any, might be paid to the assignees of the bankrupt; that in case the monies arising from the sale should be insufficient to pay what should be found due to the petitioners for principal, interest, and costs, then that the costs might be paid out of the bankrupt's estate, and that the petitioners might be admitted to prove for the deficiency, and to receive dividends rateably

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with the rest of the creditors thereon; and that for the better realising the value of their property, the petitioners might be allowed to bid at the sale.

It appeared, that the property included in the mortgage deeds of the 15th and 16th February 1826, had already been sold by the petitioners for the sum of 9000*l*.

Mr. *Wightman*, and Mr. *Anderdon*, in support of the petition. The mere omission of adding the letter *S* to the name of *Greenall*, in the letters addressed by the bankrupt to the petitioners, will not prevent the four partners from having a lien on these different securities. All the letters were, in effect, addressed to the four partners. They allude to any future advances which the petitioners might make, and the bankrupt was at the time dealing with all the four, as bankers. He never, in fact, had any transactions with the three, as bankers, since the year 1825. If the argument, which it is presumed is about to be urged by the other side, is to prevail, it must go to this extent—that a letter addressed to one of several partners, referring to advances made by the whole firm, would have no operation to secure the advances made by the firm.

Mr. *Swanston*, and Mr. *Bacon*, for the assignees. The original petition that was presented in this case, before the petitioners obtained leave to amend, stated the whole debt to be due to the three partners, *Parr*, *Lyon*, and *Edward Greenall*; while the amended petition states a great part of the debt to be due to the four. So recently, indeed, as the 13th May 1834, the petitioner, *Parr*, verifies on his oath the statement in

the former petition, by deposing on his oath before the Commissioners, that the money was advanced by the three. In the original petition, also, it is stated, that in June 1826, and not till then, *John Greenall* was admitted a partner. Now the mortgage of the Little Woolden estate was not executed till the 16th February 1826, and it stated that the debt then owing by the bankrupt, was owing to the three. The Court, therefore, cannot act contrary to the statement in the deed, and the deposition of *Parr* made before the Commissioners. [Sir *G. Rose*. It comes simply to a question of fact, whether the letter of the 2d July 1829, addressed by the bankrupt to Messrs. *Parr Lyon* and *Greenall*, was meant to be addressed to the three partners alone, and to confine the security to advances made by those three persons, to the exclusion of *John Greenall*.] We entirely rest the case upon that point. But supposing that the letter was intended to be addressed to the four, it would then relate merely to the securities held by the four; for the terms of it are: "I hereby authorize you to consider all the securities you (that is, the *four* persons to whom it is addressed) now hold of mine." This would, therefore, clearly not include the mortgage of the 15th and 16th February 1826; for that was a security held by the three. The memorandum of deposit can be only extended to the securities to which it is applicable, and not to those to which it does not apply; and that document merely refers to the securities which the four had then in their hands. Now, the only security which the four had in their hands, at the time that that memorandum was written, were the deeds relating to the houses in Haydock Street, which were deposited with *Parr* on the 9th

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1835. October 1826. The memorandum; therefore, of July 2, 1829, can only apply to those deeds. The evidence afforded by the mortgage deed, and by *Parr's* deposition on oath before the Commissioners, cannot be rejected, in favour of the statements contained in this amended petition.

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Mr. *Wightman*, in reply, was stopped by the Court.

ERSKINE, C. J.—It appears, from the facts stated on this petition, that the bankrupt, on the 2nd July 1829, wrote a letter to Messrs. *Parr Lyon & Greenall*, desiring them to consider all the securities they held of his, as responsible for any advances they had made, or might make to him, or for any deficiency that might arise in any partnership he was engaged in, so far as his own share was concerned in such partnerships. It has not been attempted to be denied, that at the time the bankrupt wrote that letter all the four petitioners were in partnership; nor can it be controverted, that the word, “Messieurs” placed before the surname “*Greenall*” would apply, in common parlance, to two persons of that name. It is quite consistent also, as it appears to me, with the state of circumstances then existing between the parties, that the bankrupt must be taken to have been addressing the firm of the four. At that time the bankers had in their possession a mortgage of the bankrupt’s estate at Little Woollen, for securing the sum of 6000*l.*, and the deeds relating to the houses in Haydock Street. It is stated in the amended petition, that *John Greenall* had been admitted into the firm as a partner from the 30th June 1825, and that the 6000*l.* which was agreed to be ad-

vanced to the bankrupt on mortgage, was part of the capital of the banking concern. On the other hand, it has been urged by the respondents, that *Parr* stated in his deposition before the Commissioners, that this money was advanced by the three partners, *Parr*, *Lyon*, and *Edward Greenall*. But it appears to me to be immaterial, which way the transaction is considered. Supposing the debt was due to the three, and that the mortgage was given to the three, then the letter of the 2nd July 1829 would amount to an equitable mortgage to the four of the previous legal mortgage to the three. The three would then be entitled to the produce of the sale of the property mortgaged, and the fourth would be entitled to an equitable mortgage after satisfaction of the legal mortgage. At the time of writing the letter, the amount of the debt due from the bankrupt was 1500*l.*; and therefore the letter must have pointed to some security greater in value than the houses in Haydock Street, the rents of which were only 35*l.* a year. But the letter refers to all the securities in the hands of the firm, treating the advances all in the same light, whether made by the three, or by the four; and the intention of the bankrupt was therefore clear, I think, to give a security for all the money advanced either by the three, or the four partners. And whether the balance was due at the time the letter was written, or became due since, the petitioners are equally entitled to the relief they now seek. With respect to the Chat-Moss property, we can make no order, because that property was previously mortgaged to *Brackenbury*; but we might, when *Brackenbury* is paid off, provide then in some way for the claim of the petitioners on this property.

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Sir J. CROSS.—I am of the same opinion on all the points of this case. There has been a good deal of confusion in the statement of the facts, arising from the change that took place in the firm of the petitioners about the time the mortgage was given, and from the mortgage being giving to three of the partners, instead of the four. But I think it may be satisfactorily explained by this circumstance, that the fourth partner admitted was the son of one of the members of the firm; and that it was perfectly immaterial to the parties entering into the contract of mortgage, how the share of *Edward Greenall* the father was to be divided between him and his son. With respect to *Parr's* deposition before the Commissioners, it was very material to the consistency of his proof on the mortgage deed, that he should state the 6000*l.* as advanced by the three, it being so stated in the deposition, and the mortgage being in fact made to the three. Whether the letter of the bankrupt of the 2nd July 1829 was addressed to the three, or the four partners, may be somewhat ambiguous; it appears, however, to have been admitted, in the latter part of the argument for the respondents, that it was addressed to the four. The letter then gave an equitable mortgage to the four on the legal mortgage previously given to the three. The letter relating to the Haydock Street property, though merely addressed to *Parr* alone, contains an engagement from the bankrupt, to give a security on those houses to *Parr and his partners* for a balance advanced by them to the bankrupt's two sons; so that it is clear, from the terms of that letter, that the bankrupt never contemplated any thing but the banking firm and the banking account. Then, in the subse-

quent letter of the 2nd July 1829, addressed by the bankrupt to the banking firm, in which he authorizes them to consider all the securities they held as responsible for any former or subsequent advances, it is not very likely that the bankrupt could have intended to confine the security to the Haydock Street property, which only brought in 35% a year, and to exclude the mortgage on that very estate from which he dated his letter. As to the Chat-Moss estate, the Court cannot at present make any order, so as to enable the petitioners to work out their equities.

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Sir G. ROSE.—It would be very expedient to meet all the difficulties of this case, in taking the accounts between the assignees and the petitioners. The only way in which the question could be put by the assignees was, as to the intention of the bankrupt at the time he wrote the letter of the 2nd July 1829. Now, there is no doubt that that letter, as indeed the assignees have themselves admitted, was addressed to the four partners in the banking firm. Then what is the effect of that letter? The bankrupt says, "I hereby authorize you to consider *all* the securities you now hold of mine, real and personal, as responsible for any advances you have, or may make to myself." It is therefore not too strong a construction of this letter, to hold it as an express engagement to make all the property on which the bankers had any securities in their hands, as available for the debt of the four; and it is clear, that the bankrupt must have considered the mortgage as then in the possession of the four. Would it have been consistent with plain common sense, to have confined the security to the Haydock

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and others.

Street property, and to have excluded the property previously mortgaged to the three? With respect to the Chat-Moss property, the question is simply this—whether the petitioners have not acquired an interest in that property, subject to *Brackenbury's* previous mortgage? The way in which that must be got at, will be by framing the order in the following terms. His Honor here recited the terms of the proposed order; which being approved of by the rest of the Court,

The Order finally made was,—That the estate at Little Woolden, comprised in the indenture of mortgage of the 15th and 16th February 1826, and the property in Haydock Street, comprised in the deeds deposited with the petitioners, should be sold in the usual manner, with liberty for the petitioners to bid at the sale; that the Commissioners should cause distinct accounts to be kept of the separate estate of the bankrupt, and also of the joint estate of the several firms mentioned in the petition, as well as of any other partnerships in which the bankrupt was engaged, and that such respective joint estates should be divided amongst the respective joint creditors of the respective firms, who should come in and prove their debts under the fiat, and that the costs of keeping such distinct accounts should be apportioned and paid out of the respective joint estates; that the proceeds of the estate comprised in the legal mortgage should be applied in discharge of the debt due to the petitioners on such security, and the surplus, together with the proceeds of the other

property directed to be sold, should be applied, first, in satisfaction of any advances made by the petitioners to the bankrupt on his own account; and in the next place, in discharge of any advances made by the petitioners to any of the partnerships, in which the bankrupt was engaged on the 2nd July 1829, to the extent of the bankrupt's interest in such partnerships; and that the Commissioners should ascertain the amount, by taking the necessary accounts for that purpose, and that the remaining surplus should be then further applied in satisfaction of what was due to the petitioners from the Bank Quay Glass Company, not exceeding the sum of 4000*l.*; that if upon taking the accounts, any question should arise as to the appropriation of any sums to any or either of the said accounts, the Commissioners should be at liberty to make a separate report for the opinion of the Court; that all necessary parties might be examined before the Commissioners upon interrogatories, and produce upon oath all books, papers, and writings relating to the matters in question; that the petitioners might prove so much of their separate debt due to them from the bankrupt, as should not be covered by the proceeds of their securities, and that the Commissioners might receive the proofs of the whole of the joint debts against any of the said firms, without any deductions; that the Court would make no order, as to the duplicate of *Magrath's* agreement; that on the petitioners electing to take the interest of the bankrupt in the western divi-

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sion of the Chat-Moss property mortgaged to Mr. *Brackenbury*, the Commissioners should set a value thereon, which should be deducted from the proof of the petitioners, who were declared to be entitled to such interest, as against the bankrupts' assignees; that the petitioners might use the names of the assignees (first well and sufficiently indemnifying them) in any suit or proceeding either to redeem the mortgage to *Brackenbury*, or otherwise in respect of such security; that the costs of the petitioners and assignees, up to and including the order, should be paid out of the proceeds to arise from the sale of the estates; and that further directions and subsequent costs should be reserved; with liberty for any of the parties to apply relating thereto.

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Ex parte GEORGE BRUNSKILL.—In the matter of JOHN BENTLEY, CHARLES DEAR, and JOHN MALLCOTT RICHARDSON.

Westminster,
April 30.

Where the holder of bills, which were deposited with him by the bankrupts as a collateral security for a debt, proved the amount of the balance due, excepting the bills as a security, and some of the bills were afterwards paid

THIS was the petition of a creditor for the payment of a dividend under the following circumstances.

G. and W. Brunskill (the petitioner being the surviving partner of that firm) had various dealings and transactions with the bankrupts, both in selling goods to them, and in accommodating them with loans of money; and on the 5th July 1834 the bankrupts owed them a balance on these transactions of 4000/. On

in full :—*Held*, that the amount of the bills so paid must be deducted from the proof, and the dividends calculated only upon the residue of the debt.

that day the bankrupts applied for a further advance of 1000*l.*, which *G. and W. Brunskill* agreed to make, on the bankrupts giving their own acceptances for the amount, and indorsing and transferring bills of exchange for a like amount, as a security as well for the advance then requested, as for the general balance of account then due, and for any further balance which should become due. These terms were acceded to by the bankrupts; and it was also further agreed, that the bills so indorsed and transferred to *G. and W. Brunskill* should be held and negotiated by them as they should think fit, and that the proceeds thereof should stand by them as a general security for the whole balance of account then due, or to become due, from the bankrupts, during the time the bills had to run, before they should arrive at maturity and be paid. In like manner, other advances were made by the *Brunskills* after the 5th July, for which the bankrupts received other bills of exchange from them upon the same terms,—except only that one of the bills so received, amounting to 551*l.* 10*s.*, was discounted by *G. and W. Brunskill* for the bankrupts.

On the 13th September 1834 a fiat issued against *Bentley & Co.*; when they were indebted to *G. and W. Brunskill* in a balance of 4468*l.* 1*s.* 5*d.*, which included the bill for 551*l.* 10*s.* and interest on the several advances. *G. and W. Brunskill* had received from the bankrupts 32 bills of exchange, including the bill for 551*l.* 10*s.*, and amounting together to 7047*l.* 9*s.* 4*d.*; but, with the exception of the bill for 551*l.* 10*s.*, all these bills were received by them as a security for the whole of the debt then due from the bankrupts to the *Brunskills*.

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The petitioner, as surviving partner, proved the sum of 4468*l.* 1*s.* 5*d.* as the amount of the balance due to him, excepting the several bills as a security, and setting them forth in a schedule at the foot of the deposition; and the bills were duly exhibited before the Commissioner. Subsequent to the proof, however, the bill for 551*l.* 10*s.* had been paid, as well as 18 of the other bills, amounting to 945*l.* 12*s.* 3*d.*

On the 11th February 1835 a dividend was declared under the fiat of 5*s.* in the pound; when the petitioner applied for a dividend on the amount of his proof, deducting only therefrom the 551*l.* 10*s.* received on the bill which had been discounted; but the assignees insisted, that the whole amount of the bills which had since been paid, ought to be deducted from the amount of the proof. The petitioner claimed a right to hold all the bills, except the one which had been discounted, as a general security for the whole of the debt due from the bankrupts at the date of the fiat, and to make the same available, as far as he could; insisting, therefore, that he was entitled to receive dividends on his whole proof, reduced only by the sum of 551*l.* 10*s.*, on his undertaking to refund to the estate whatever he should receive upon such securities, and in respect of dividends on the estate, above 20*s.* in the pound on the amount of such reduced proof.

The prayer was, that the assignees might be ordered to pay to the petitioner the dividend of 5*s.* in the pound on the sum of 3916*l.* 11*s.* 5*d.*, being the amount of the debt proved, *minus* the sum of 551*l.* 10*s.*, together with interest on such dividend from the 26th February, when the petitioner demanded payment of it, and also the costs of this application.

Mr. *Swanston*, and Mr. *Bacon*, were in support of the petition. The case of *Ex parte Sammon* (a) appears to decide the question raised on this petition. In that case bills amounting to 1320*l.* were delivered by the drawer to a creditor, as a collateral security for a debt of 4000*l.*; and the drawer and acceptor having become bankrupt, and the estate of the acceptor proving solvent, it was held that the creditor was entitled to receive 20*s.* in the pound on the bills against the estate of the acceptor, and also to prove the debt of 4000*l.* and receive dividends, in liquidation of the remaining portion of his debt, under the commission against the drawer. In the present case, the bills were indorsed by the bankrupt to the petitioner, as a general security for the whole amount of his debt; and the subsequent bankruptcy of the debtor ought not to deprive the creditor of the security, for which he stipulated when the debt was contracted. In *Ex parte Barratt* (b), where a creditor had proved in respect of several bills drawn by the bankrupt, and one of the bills was subsequently paid in full, it was held, certainly, that so much of the proof as related to that bill must be expunged; but the Vice-Chancellor's judgment in that case proceeded upon the ground of the bills having been *discounted* by the creditor; for the law, he said, considered each discount transaction as a distinct isolated transaction; and though the form of proof was upon the loan, yet the proof was in truth upon each bill separately. That circumstance distinguishes that case from the present. The bills in this case were not discounted by the petitioner; but the bill for 551*l.* 10*s.*, which *was* discounted by him,

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BRUNSKILL.

(a) 1 Deac. & Ch. 564.

(b) 1 G. & J. 327.

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he never objected to deduct from the amount of the proof. [*Erskine*, C. J. Have you referred to *Ex parte Burn* (a) in the first volume of *Sir G. Rose's Reports*, and *Ex parte Smith* (b), and *Ex parte Bloxham* (b), in *Cooke's Bankrupt Law*? They are decidedly against the position you are now contending for.] In those cases, it does not appear that the holder of the bills had stipulated with the bankrupt that the bills were to be a security for the whole of his debt. If the proof here had been *on the bills*, then it is admitted, that if the whole amount of any one bill had been afterwards paid, it ought to be deducted from the proof. But the proof made by the petitioner was upon the balance of the debt, excepting the bills as a security.

Mr. *Bethell*, for the assignees. The amount of all the bills, which have been paid subsequent to the proof, ought to be deducted from the sum proved, before any dividend is payable on it. There is a positive rule of Court (c), that the creditor must produce any bills he holds, before he can receive the dividend on his debt; but the bills in this case having been paid, the petitioners must of course have given them up to the acceptors, and therefore are wholly unable to comply with the order of the Court, so as to entitle them to receive the dividend.

Mr. *Swanston*, in reply. In *Ex parte Barratt* (d), it was contended by counsel, that as the proof in that

(a) 2 *Rose*, 55.

(b) 1 C. B. L. 155.

(c) See General Order, 28th March 1832, 1 Deac. & Ch. Appendix, xxxii. e.

(d) *Suprà*.

case was upon the debt, and not upon the bills, the creditor was entitled to receive dividends upon the whole debt proved, until he was paid the full amount; and Sir *J. Leach* appears to recognize that proposition; for he draws a distinction where the bills have been discounted, and says that under those circumstances, though the form of proof be upon the loan, the proof is in truth upon each bill separately.

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ERSKINE, C. J.—It having been agreed by the counsel, that this petition should be heard, as if a counter-petition had been presented for expunging the proof, the Court are now prepared to give their judgment, as if such counter-petition had been presented. A long series of decisions for several years has determined, that where the holder of several bills proves the aggregate amount of them, excepting them as a security, and any of the bills are afterwards paid in full, the amount of the bills paid must be deducted from the proof, and the future dividends be paid upon the residue of the debt only. After all these decisions, beginning with *Ex parte Smith*, and ending with *Ex parte Barratt*, without a single case having been determined to the contrary, the Court can come to no other conclusion than that this petition must be dismissed. It has been admitted by the counsel for the petitioners, that if the bankrupts had not indorsed the bills, then the amount of what has been received must be deducted from the proof. But I can see no difference in this respect, whether the bills are indorsed, or not indorsed; nor do the cases in the books make any such distinction, where the bills are given as a

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BRUNSKILL.

security for the payment of an antecedent debt. But all the cases uniformly hold, that where a creditor proves the whole amount of his debt, excepting the bills, and any of them are afterwards by any means fully satisfied, they must be taken as a payment *pro tanto*. *Ex parte Barratt* does not interfere with the previous decisions; but the Vice-Chancellor's reasoning is rather in accordance with the principle on which they are founded. A distinction has been attempted to be drawn between the cases, where the creditor proves upon the bills, and where he proves upon the debt, excepting the bills as a security. But can ~~this~~ petitioner, by altering the mode of his proof, alter the rights of the other creditors of the bankrupts? I am of opinion, that the amount of the proof in this case must be diminished by the amount of the bills received.

Sir J. CROSS, and Sir G. ROSE, concurred.

It was Ordered, that the petition should be dismissed, but without costs; that the assignees should have their costs out of the estate; that the proof should be reduced by the amount of the bills received; and that the dividend should be paid upon the residue.



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Ex parte JOHN FLOWER.—In the matter of

JOHN CORMIE.

Westminster,
May 1 and 2.

THIS was the petition of a creditor, that the assignees might pay over to him the amount of two bills of exchange, which had been received by them under the following circumstances:

The bankrupt was in the habit of shipping large quantities of china and earthenware, manufactured by him, to *Marsden and Flower*, of Sydney, in New South Wales; and the petitioner was accustomed to accept bills of exchange, for the purpose of enabling the bankrupt to make these shipments, and upon the security of the return proceeds, which bills the bankrupt disposed of for his own use. In the years 1831, 1832, 1833, and 1834, the bankrupt made seven of these shipments to *Marsden and Flower*, upon each of which occasions the petitioner accepted a bill for the full amount of the invoice price, which the bankrupt either paid away or discounted. Previous to these acceptances being given, however, it was agreed between the petitioner and the bankrupt, that the proceeds of the several consignments should be received by the petitioner, either direct from *Marsden and Flower*,—or in case they should come into the hands of the bankrupt, that the same should be held by him in trust for and immediately paid over to the petitioner,—and should be appropriated and applied by him in discharge of his previous acceptances. *Marsden and Flower* were aware of these transactions between the petitioner and the bankrupt, and consented to the arrangement. The bankrupt, in his books of account, was accustomed to enter the several bills,

The bankrupt shipped goods to M. & F. at New South Wales, and the petitioner accepted bills drawn by the bankrupt for the invoice price, upon the express agreement that the proceeds of the several consignments should be received by the petitioner, and be appropriated by him in discharge of such acceptances; and notice of this agreement was given to M. & F. Two bills, which were remitted to England by M. & F. on account of the proceeds of some of the shipments made by the bankrupt, came to the hands of the assignees:—*Held*, that the petitioner was entitled to the proceeds of these bills, as well as all the future proceeds that might come to the hands of the assignees, in respect of the shipments made by the bankrupt to M. & F., to be applied in discharge of the petitioner's acceptances.

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FLOWER.

when first drawn and accepted, to the credit of *Marsden* and *Flower*, against the consignments so made to them, and not to the credit of the petitioner; and when the remittances arrived, they were either paid over direct to the petitioner, or the amount was received by him for the purpose of meeting his acceptances. This agreement between the petitioner and the bankrupt was afterwards recognized by the bankrupt in various letters that passed between them, as well as in a letter of the 14th February 1834 addressed to one of the partners in the house of *Marsden* and *Flower*, who happened to be then in London, in which the bankrupt said—"I have written to Mr. *Flower* (the petitioner), and in my letter have stated, that as he accepts, to oblige me, for goods sent to your house, I wish all bills or payments from Sydney to be sent direct to him, as you will see by my letter to your house at Sydney."

On the 17th June 1834, a fiat was issued against the bankrupt.

On the 28th July 1834, *Marsden* and *Flower* wrote to the petitioner, acknowledging the receipt of the advice sent out to them by the bankrupt in his letter of the 14th February 1834, in the following terms: "We are in receipt of advices from our mutual friend, Mr. *John Cormie*, of Burslem, requesting us to remit his net proceeds direct to you as they fall due in our hands, which shall be punctually observed." This letter was received by the petitioner on the 16th December 1834.

In November 1834, the bankrupt received a letter from *Marsden* and *Flower*, inclosing a bill of exchange drawn by them on *Aspinall Bourne & Co.* of Liverpool for 300*l.* 8*s.* 4*d.*, which was remitted on account

of the proceeds of some one or more of the shipments made by the bankrupt. On receiving this bill, the bankrupt wrote to the petitioner, informing him of its having come to his hands, and saying—"this bill certainly belongs to you, and till I hear from you, I shall retain the bill till I have your instructions." The petitioner, in reply, ordered the bankrupt to remit the bill to himself; but instead of doing this, the bankrupt handed it over to his assignees, who received the amount when it became due. The assignees also received another bill from *Marsden and Flower*, for 136*l.* 18*s.* 2*d.*, drawn by them on *Buchles Bagster and Buchanan*, which was likewise remitted by *Marsden and Flower* on account of the proceeds of some or one of the seven shipments made to them by the bankrupt. This bill was not paid when due, and remained in the hands of the assignees.

The bankrupt, at the time of his bankruptcy, was indebted to the petitioner, on the general account between them, considerably exceeding the amount of the bills so accepted by the petitioner upon the security of these shipments.

The petition prayed, that the assignees might be ordered to pay to the petitioner the amount of the two bills for 209*l.* 8*s.* 4*d.* and 136*l.* 18*s.* 2*d.*, or so much of those sums as might have come to their hands; and that in case either of the bills remained in their hands, they might be directed to transfer and indorse the same to the petitioner, as well as to transfer and pay to him all the bills and money that might have already come, or that should thereafter come to their hands, in respect of the proceeds of the several shipments made by the bankrupt to *Marsden and Flower*; that the assignees

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Flower.

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FLOWER.

might be directed to keep separate and distinct accounts of the remittances received by them on account of these shipments; that the petitioner might be at liberty to prove his debt, after deducting what he might so receive from the assignees, the petitioner being willing to reduce such proof to the extent of any payments, that might thereafter be made in respect of the proceeds of such shipments; and that the assignees might pay the costs of this application, either personally, or out of the bankrupt's estate.

Mr. *Swanston*, and Mr. *Dixon*, appeared in support of the petition. There was in this case a specific appropriation by the bankrupt of the proceeds of the different shipments, towards the payment of the several bills accepted by the petitioner. This plainly appears from the bankrupt's letter of the 14th February 1834 addressed to *Marsden* and *Flower*, and from their letter of the 28th July 1834 addressed to the petitioner. The petitioner, therefore, had a specific interest in the proceeds of these goods, which was not divested by the bankruptcy of *Cormie*; and any remittances from *Marsden* and *Flower*, which came to the hands of the assignees after the bankruptcy of *Cormie*, were clothed with a trust for the payment of the bills; *Ex parte Copeland* (a), and *Ex parte Prescott* (b).

Mr. *Campbell*, for the assignees. The agreement between the petitioner and the bankrupt, as set forth in the petition, leaves the proceeds of the various shipments made by the bankrupt to *Marsden* and *Flower*, in the order and disposition of the bankrupt at the

(a) 3 Deac. & Ch. 199.

(b) Id. 218.

time of his bankruptcy. The bills accepted by the petitioner were mere accommodation bills, and were never considered as payment between the bankrupt and *Marsden* and *Flower*. It appears also by the bankrupt's ledger, that in his general account with the petitioner for 1833, he regularly debited the petitioner with such of the remittances from *Marsden* and *Flower*, as had been received from them on the bankrupt's account during that year. There was no complete appropriation of the proceeds of the goods, as far as related to the two bills mentioned in the petition; for these bills were remitted by *Marsden* and *Flower* from Sydney, before they received any advices from the bankrupt that they were to remit to the petitioner.

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Ex parte
FLOWER.

Mr. *Montagu* appeared for the bankrupt.

Mr. *Swanston*, in reply, was stopped by the Court.

ERSKINE, C. J.—The Court is of opinion, that the petitioner is entitled to have the remittances from Sydney applied in discharge of all the acceptances, which were given by him on the faith of those remittances being made to him by *Marsden* and *Flower*. There was an express agreement between the bankrupt and the petitioner, that the proceeds of the various shipments should be applied in discharge of the bills accepted by the petitioner, and due notice of this agreement was given to one of the partners of the house of *Marsden* and *Flower*, who was then in England. Before the two bills in question, however, were remitted from *Marsden* and *Flower*, *Cormie* became a bankrupt; but the estate was bound by the previous agreement of

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Ex parte
Flower.

the bankrupt, and the proceeds remitted from Sydney were clothed with a trust, in favour of the acceptor of the bills. There was, in fact, an equitable assignment of the proceeds for satisfying the amount of the acceptances. Every thing was done, that could be done in this country, to give notice to the Sydney house, to take the case out of the rule of reputed ownership. And the bills in question cannot be said to have been in the order and disposition of the bankrupt, with the consent of the true owner; for they were remitted by *Marsden* and *Flower* to England, without the consent of the true owner.

Sir J. Cross.—It appears, from the correspondence between the bankrupt and the petitioner, that long prior to February 1834, when the bankrupt gave notice of his agreement with the petitioner to the house of *Marsden* and *Flower*, a course of dealing was pursued between the bankrupt and the petitioner, that would have entitled the petitioner to have the proceeds of the different shipments applied in discharge of his acceptances, independently of the bankrupt's letter of the 14th February 1834. But that letter gave express directions to *Marsden* and *Flower*, to remit all bills or payments from Sydney direct to the petitioner. It is alleged, that the two bills in question were remitted by the house at Sydney before those directions could have reached them; but the directions were given long previously to one of the partners, who was in England. It appears to me, that there is in this case nothing to do with the question of order and disposition; for the bills were remitted to the bankrupt without the consent, or even the knowledge, of the petitioner.

Sir G. ROSE concurred.

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Ex parte
Flower.

The ORDER was, that the assignees should pay to the petitioner the balance of the proceeds of the bill for 209*l.* 8*s.* 4*d.*, after deducting therefrom the costs of the petitioner; that the assignees should also transfer and indorse to the petitioner the bill of exchange for 136*l.* 18*s.* 2*d.*, and pay to him the future proceeds that might come to their hands, in respect of the several shipments made by the bankrupt to *Marsden* and *Flower*, to the extent of what was due to the petitioner in respect of his acceptances; that the assignees might have liberty to apply to the Court; that the costs of the petitioner should be paid by the assignees out of the said sum of 209*l.* 8*s.* 2*d.*, and that they might retain their own costs out of the estate; and that the costs of *Marsden* and *Flower* should be paid by the petitioner.

Ex parte BEVERIDGE.—In re HUTTON.

THIS was a petition to appoint a new trustee in lieu of the former, who had become bankrupt, without a reference to the Registrar. The trust property produced no more than 100*l.* per annum.

May 5.
A new trustee appointed, without a reference to the Registrar, on an affidavit of the fitness of the proposed trustee.

Mr. Barber, for the petitioner, cited *Ex parte Inkersole* (a).

(a) 2 G. & J. 230.

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Mr. *Simpson*, for the bankrupt.

Ex parte
BEVERIDGE.

The COURT granted the application, on production of an affidavit of the fitness of the proposed new trustee.

May 5.

An executor
may prove
against a bank-
rupt co-execu-
tor, without an
order for that
purpose.

Ex parte COURTNEY.—In re DAVIS.

IN this case an executor applied for liberty to prove a debt incurred by the bankrupt to the trust-estate, the bankrupt being the co-executor of the petitioner.

Mr. *Swanston*, and Mr. *Stinton*, in support of the petition, cited *Ex parte Brown* (a).

Mr. *Ash*, *contra*, on behalf of the assignees.

Sir G. ROSE.—There is no necessity for any order in this case. You need not have come here at all; as one executor may always prove against his co-executor.

Mr. *Swanston*. As the executor is also to be regarded as a trustee, it is thought advisable to take the order.

The COURT made the order, the petitioner paying the costs.

(a) 1 Dea. & Ch. 118.

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Ex parte MARTIN.—In the matter of COWDEROY.*Westminster,
May 10.*

THIS was the petition of a creditor, claiming to be an equitable mortgagee, for the usual order. It was stated in the petition, that the bankrupt (previously to obtaining a lease from his landlord, which was about to be granted to him) agreed to deposit it with the petitioner, as a security for a debt of 400*l.*, which he then owed to the petitioner for the purchase of goods, and also to secure the payment of any future purchases; and that in pursuance of this agreement the bankrupt, after he obtained the lease, deposited it with the petitioner; but there was no written memorandum containing the terms of the deposit.

In a case of doubt, and where there is no memorandum in writing accompanying the deposit of deeds, the Court leans against the deposit, as a security for an antecedent debt, —though it favours it, in regard to subsequent advances.

In answer to this statement of the petitioner, the bankrupt made an affidavit, in which he swore that being indebted to the petitioner in the sum of 400*l.*, and wanting to purchase of him a hogshead of sugar, he took the lease to him to look at, for the purpose of inducing him to give him future credit, and that he left it with him in the hopes of obtaining the hogshead of sugar, and not as a security for any previous debt; that the bankrupt had made various payments to the petitioner, which covered the amount of all goods which he had subsequently bought, and had also reduced the original debt to 319*l.*

Mr. Ching appeared in support of the petition.

Mr. Moore, for the assignees. The first question is, whether the lease in this case was deposited to secure any thing; and secondly, if it was deposited as

1835. a security, what was the amount intended to be secured. In *Mountford v. Scott* (a),—where it was clearly shown that deeds were deposited with a creditor, not for an antecedent debt, but for the purpose of obtaining future credit,—it was held, that the party had no lien thereon for the money previously advanced.

Ex parte
MARTIN.

Mr. *Ching* was heard in reply.

ERSKINE, C. J.—The whole question here depends upon the fact, whether the lease was deposited to secure the pre-existing debt, or merely as a security for the price of the goods to be afterwards supplied by the petitioner. As this is an application by a creditor for the special interposition of the Court, it is for him to make out by satisfactory evidence, that the lease was deposited for securing the payment of the whole debt. Where there is a written memorandum accompanying the deposit, then it explains the extent to which the deposit of the deed was intended to operate as a security. But when a party is so negligent, that he does not take a written memorandum, he must then make out clearly such intention by parol testimony. If I was sitting as a juryman, I might perhaps be inclined to believe the statement given by the petitioner. But as there is conflicting testimony in the case, I think the petitioner is not entitled to the usual order of the Court. The lease must be sold; and if it does not produce more than the amount of the debt, which accrued subsequent to the deposit, the petitioner can have no claim to the proceeds, as he has been paid the whole of that debt; but if it produces more, he can come again to the Court.

(a) 1 Turn. 274.

Sir J. Cross.—I should say, that when a deed is deposited generally by a debtor with his creditor, the probability was, that the intention of the deposit was to secure the antecedent debt, as well as any subsequent debt. But I should wish to read all the affidavits carefully, before I give any opinion on the facts of this case.

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Ex parte
MARTIN.

Sir G. Rose.—If the petitioner presses for the judgment of the Court, I have no difficulty in saying, that an equitable mortgagee is not entitled to an order for sale, against the dissentient affidavit of the bankrupt. The bankrupt in this case swears, that the lease in question was deposited with the petitioner, not as a security for any previous debt, but with a view to obtaining future credit. The order of the Court proceeds on a principle which has always been recognized in these cases, namely, to order the sale of the property only, where the Court is satisfied of the special purpose for which the deed was deposited. Therefore, although an equitable mortgagee is entitled to have an order for the sale of a specific security, yet it is the duty of the Court to sift his case to the greatest extent which the interests of the creditors require, and to find out the truth, if necessary, by a *vivâ voce* examination. The question we have to ask ourselves here is, what was the *intention* of the bankrupt at the time the lease was deposited. The petitioner says one thing, and the bankrupt another; the better way, therefore, to come at the real fact, is by an examination *vivâ voce*. If any money had been advanced, or goods supplied by the petitioner, at the very time the lease was deposited, then there would be

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**Ex parte
MARTIN.**

no difficulty in the case; for the object of the deposit would have been then perfectly clear. But the Court always, in a case of doubt, leans against the deposit of a deed as a security for an antecedent debt, though it favours it in regard to subsequent advances.

The ORDER was, that the lease should be sold; and if the proceeds of the sale should exceed the amount of the subsequent debt, then that the petitioner should have liberty to apply again to the Court; and that the petitioner should pay the costs of this petition.

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*Westminster,
May 10.*

Before an assignee applies for leave to bid at the sale of the bankrupt's property, he must call a meeting of the creditors, for the purpose of assenting to, or dissenting from, such proposed bidding.

Ex parte MOLINEUX.—In the matter of **BLIGHT.**

THE petitioner was the sole assignee under the fiat, and he now applied for leave to bid at the sale of certain shares in a mine, which had belonged to the bankrupt. The property had already been put up three different times for sale, but no offer had been made beyond 800*l.*, and it had consequently been bought in. There had been no meeting of creditors previously called, for the purpose of assenting to, or dissenting from, this proposal of the assignee.

Mr. K. Parker appeared in support of the petition.

The COURT said, that the petitioner might make his election, either to give up his office of assignee, and proceed to a new choice of assignees; or to call a meeting of creditors, for the purpose of assenting to, or dissenting from, the assignee having liberty to bid at the sale.

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**Ex parte WILLIAM BARRINGTON, the younger.—In
the matter of WILLIAM BARRINGTON.**

1835.

*Lincoln's Inn
Hall, coram
Lords Commis-
sioners Shadwell
and Beaumont.
May 15 & 16.
June 6.
July 13.*

THIS was a petition of appeal to the Lord Chancellor from the decision of the Court of Review in *Ex parte Sidebotham* (a), which was heard by that Court on the 14th July 1834. The appeal was brought on by way of *petition* (b), instead of special case, under an order of Lord Chancellor *Lyndhurst*, which had been obtained by the appellant for that purpose.

The Court of Review has jurisdiction to enforce the specific performance of a contract of sale of the bankrupt's mortgaged property, which is sold under the usual order, against the purchaser of such property; and has also authority to decide, on evidence adduced before it, whether the purchaser has accepted the title.

The petition of appeal, after reciting the statement of the facts contained in the original petition, proceeded to allege, that it appeared from the affidavits filed in answer thereto by the present appellant, that the bankrupt had in 1829 been discharged under the Insolvent Debtors' Act, and that the debt of the petitioning creditor had been inserted in the schedule filed by the bankrupt on applying for his discharge; and that the bankrupt had, upon obtaining such discharge, duly executed the usual assignment of all his estate and effects to the provisional assignee of that Court; and that the estate and interest of the bankrupt in the premises comprised in the said contract of sale were, at the time the order for sale was made by the Commissioners, and still were, vested in such provisional assignee, and that such assignee had not been in any respect a party to any of the proceedings under the present fiat; and that on the hearing of the former petition before the Court of Review, the appellant then objected that the Commissioners had no jurisdiction to make any order for the sale of the pro-

*Ex parte
Sidebotham,
3 Deac. & Ch.
818, confirmed
on appeal.*

(a) See 3 Deac. & Ch. 818.

(b) See *Ex parte Keys*, 3 Deac. & Ch. 263.

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Ex parte
BARRINGTON.

perty,—that the same was void,—and that the Court of Review had no jurisdiction to enforce specific performance of a contract of sale made under an order of Commissioners, and ought not, under the circumstances, to enforce performance of such contracts,—and that a good title had not been, and could not be, made to the said premises.

The petition of appeal then proceeded to state, that the Court of Review overruled these objections, and made an order, dated the 24th July 1834, whereby it was declared that the contract or agreement of the 5th June 1833, for the purchase of the property by the appellant, ought to be performed, and that the appellant had accepted the title of the then petitioners to the pieces of land mentioned or referred to in such contract; that it was ordered, that the appellant should within one calendar month, to be computed from the date of the said order, pay into the bank, in the name and with the privity of the Accountant-General, on the credit of the matter of *William Barrington*, a bankrupt, the sum of 370*l.* in the said petition mentioned, as the amount of the purchase money therein also mentioned, together with interest thereon, at the rate of 4*l.* per cent. per annum, from the 9th November 1833 until the time of payment, the amount thereof to be verified by affidavit; that the said sum, when so paid into the bank, should be laid out in the purchase of bank 3*l.* per cent. annuities, in the name and with the privity of the said Accountant-General, in trust in the same matter, who was to declare the trusts thereof, subject to further order; that the petitioners in the original petition named, and all other necessary and proper parties, should convey the said piece of land to

the appellant, or as he should direct,—such conveyance to be settled by *Francis Gregg, Esq.* an officer of the said Court, in case the parties differed about the same; that upon payment of the purchase money and interest into the bank, the promissory note for 37*l.*, mentioned in the said contract or agreement, should be returned to the appellant, and that no proceeding at law or otherwise should be taken in the meantime on such note; that the appellant should pay to the then petitioners their costs of and occasioned by the said application, such costs to be taxed by the said *Francis Gregg*, if the parties differed about the same, and that the said parties, or any of them, were at liberty to apply to the Court in the matter, as they should be advised.

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Ex parte
BARRINGTON.

The petition then alleged, that the appellant was advised, and submitted, that the Commissioners had no jurisdiction for making the order of the 3d May 1833 for the sale of the property, and that the Court of Review had also no jurisdiction for making the said order of the 24th July 1834, and that said last-mentioned order was otherwise altogether erroneous and improper; and that, under the circumstances aforesaid, the appellant was advised that his proper remedy was by petition, and not by special case.

The prayer was, that the Lord Chancellor would answer and hear this petition, as an appeal from the said order of the Court of Review, and that such order might be discharged; and that the petition, on which such order was founded, might be ordered to be dismissed with costs.

Mr. *Jacob*, and Mr. *Bethell*, in support of the peti-

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tion of appeal. The ground on which we impeach the decision of the Court of Review is, that the whole substratum of the order of that Court is wrong; the order of the Commissioners for the sale of the property, on which order that of the Court of Review was founded, being also wrong. If the Commissioners had no authority to make such an order, it follows that the Court of Review had no jurisdiction to enforce the performance of it. Now, the directions in Lord *Loughborough's* General Order (a), both for taking the mortgage accounts, and for the sale of the mortgaged premises, apply to those parts only of the bankrupt's estate, which are distributable under the commission,—and not to the case of a mortgage, where the bankrupt is not entitled to the equity of redemption. The order was intended to apply, only, where the mortgagee and the assignees represented the whole interest in the subject-matter. It is not a judicial order for sale, but only a regulation as to proof in bankruptcy. The General Order directs, that all proper parties should join in the conveyance to the purchaser, as the Commissioners should direct. It is essential, therefore, to the validity of the order of sale by the Commissioners, that the bankrupt should be entitled to the equity of redemption; for if a stranger is entitled to it, the Commissioners would have no power to direct him to join in the conveyance. Thus in *Ex parte Jackson* (b), it was decided that the Lord Chancellor had no authority in bankruptcy to compel a second mortgagee, not claiming under the commission, but resting upon his security, to join in a sale obtained by a prior mortgagee under the General

(a) 8 March 1794: See 2 Deac. B. L. 92.

(b) 5 Ves. 357.

Order, which did not produce enough for both mortgages. And the same point was ruled in *Ex parte Topham* (a). Now whilst the mortgage in this case was in force, the bankrupt took the benefit of the Insolvent Debtors' Act. By the 13th section of that act (b) it is enacted, "that the filing of the petition of every person in actual custody, who shall be subject to the laws concerning bankrupts, and who shall apply by petition to the said Court for his or her discharge from custody, according to this act, shall be accounted and adjudged an act of bankruptcy from the time of filing such petition; and that any commission issuing against such person, and under which he or she shall be declared bankrupt before the time appointed by the said Court, and advertised in the London Gazette, for hearing the matters of such petition, or at any time within two calendar months from the time of filing such petition, shall have effect, to avoid any conveyance and assignment of the estate and effects of such person, which shall have been made in pursuance of the provisions of this act; provided always, that the filing of such petition shall not be deemed an act of bankruptcy, unless such person be so declared bankrupt before the time so advertised as aforesaid, or within such two calendar months as aforesaid; but that every such conveyance and assignment shall be good and valid, notwithstanding any commission of bankrupt under which such person shall be declared bankrupt after the time so advertised as aforesaid, and after the expiration of two calendar months as aforesaid." Now, the fiat in this case was not issued until the 22nd February 1833;

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(a) 1 Madd. 38.

(b) See 7 Geo. 4. c. 57. continued by 1 Will. 4. c. 38., and 2 Will. 4. c. 44.

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and of course there could be no adjudication of bankruptcy before the time appointed by the Insolvent Court for hearing the matters of the insolvent's petition, or within two calendar months from the time of filing such petition. There can be no doubt, therefore, that this property of the equity of redemption passed to the assignee under the Insolvent Act, and was legally vested in him at the time of the issuing of this fiat. Consequently, he was not bound by the order of the Court of Review; for the jurisdiction of that Court is limited to parties claiming under the fiat, and not where one party claims on one side, and a stranger to the fiat claims on the other side. It is true, that in *Ex parte Gould* (a), an order was made by Sir J. Leach, when Vice-Chancellor, that a purchaser of the bankrupt's mortgaged estate, which had been sold before the Commissioners under the General Order, should complete his purchase. But that case, which is the only authority for the present order, cannot be supported; for *Fry*, the purchaser in that case, did not appear upon the hearing of the petition, and therefore the Vice-Chancellor had no jurisdiction to make such an order. In the recent case, also, of *Ex parte Lucas* (b), Sir G. Rose doubts the authority of *Ex parte Gould*. It was contended before the Court of Review, on the hearing of the present case, that as the purchaser granted a lease of the property to a third party, he waived any objection to the title. But how often does it happen, that a man contracts to grant a lease to another, as soon as a purchase is completed, and before he knows whether the title is good or bad? Is that an acceptance of title? In *Burnell v. Brown* (c),

(a) 1 G. & J. 231.

(b) 3 Dea. & Ch. 147.

(c) 1 J. & W. 168.

which was cited in the argument before the Court of Review, possession was deliberately taken by the purchaser after the delivery of the abstract, on which the objections to the title were apparent. But in *Burrows v. Oakley* (a), it was decided that objections to title were not waived by the taking possession, or even by the exercise of acts of ownership. The Court of Review, by its order, thinks proper to infer that taking possession amounts to a waiver of any objection to the title. It may be so, or not, according to the circumstances under which possession was taken; but it is not necessarily an acceptance of title. And here there was no unequivocal act of the purchaser, to denote an acceptance of title. The Court of Review also directs a specific performance of the contract by the purchaser, and that a conveyance should be settled by the Deputy Registrar. But the Deputy Registrar of the Court of Review has not the authority of a Master in Chancery, for the investigation of title. And when the constitution of that Court is considered, it can never be contended, that the order of country Commissioners is an order of that Court; nor has it been hitherto decided, that a man, who happens to purchase property from assignees, can be dragged by them before a tribunal of limited jurisdiction, because the assignees themselves derive authority from that jurisdiction. If a man purchases directly from the Court, then he is subject to its jurisdiction; but not merely if he purchases from one, who is only subject to the jurisdiction of the Court. The order of the Court of Review, therefore, was wrong on three distinct grounds: 1. There was no judicial sale of the property in question;

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(a) 3 Swanst. 159.

1835. 2. The Court of Review had no jurisdiction to enforce
Ex parte a specific performance of the contract; and 3. The
BARRINGTON. facts of the case did not warrant their judgment.

Mr. *Swanston*, Mr. *Teed*, and Mr. *J. Russell*, for the respondents. The case of the respondents might be rested on one single point. There is an unanswerable objection to this petition of appeal, and that is, that there is no substantial object to be attained by it; it involves a mere question of fact, and nothing else. The Court of Review, by their judgment, determined that the purchaser had accepted the title. The Chief Judge expressly says in his judgment, that "the question of waiver is not one of law, but of fact, depending on the special circumstances of the case." And he adds—"Looking at all the facts of this case, it is impossible to doubt that when *Barrington* the younger executed the lease to Mr. *Arden*, he did so, meaning to adopt the contract, and waive the objections to the title,—all of which he must have well known from the very commencement of the transaction." We are entitled therefore to resist this appeal on that ground, namely, that the Court of Review has found that the party accepted the title, which is not a question of law, but one altogether of fact. [Lord Commissioner *Shadwell*. Is not the inference arising from the facts of this case an inference of law?] An inference, or presumption, of fact is not an inference of law. The Chief Judge of the Court of Review dwells on the *intention* of the party in taking possession of the property; and such intention would of course be a question for a jury, in case the appellant had been sued at law for non-performance of his contract. The like grounds are assigned for the decision of the Court in the contempo-

aneous report (a) of the same case, where the Chief Judge is made to say, that "the purchaser *intended* to give the lessee possession under his title as purchaser, and intended to waive all objections to title." So that both reports in substance agree. Before the passing of the late act of parliament, there was no appeal in matters of bankruptcy; but now, by the 2d section of that act, an appellate jurisdiction is given to the Lord Chancellor, which is, however, limited to "matters of law and equity, or on the refusal or admission of evidence only;" and the mode prescribed is on a special case. In *Ex parte Keys, re Terry* (b), Lord Brougham said, that the words in the act of parliament, "except the Lord Chancellor shall otherwise direct," were not added in the 3d section to enable the Chancellor to hear any matter *merely* of fact, on petition. A question of *intention* therefore, being merely a question of fact, cannot be the subject of an appeal. It is somewhat singular, that in the petition of appeal it is nowhere suggested, that the appellant disputed the fact of his acceptance of the title; and yet the laboured argument of the other side, to-day, has proceeded on the fact of the alleged insufficiency of the title. The original petition to the Court of Review alleges, expressly, that the purchaser had accepted the title; and the Court of Review has also expressly decided on that fact, by the terms of its order. [Lords Commissioners *Shadwell* and *Bosanquet* both admitted the correctness of this observation, as to the acceptance of the title being alleged in the petition, and stated in the order.] And not merely has it been found by the Court below, that the title has been accepted by the appellant; but it is nowhere alleged in the present petition of appeal, that he did not

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(a) See 1 Mont. & A. 661.

(b) 3 Deac. & Ch. 266.

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accept the title. On the present occasion, the appellant has endeavoured to impeach the order of the Commissioners for the sale of the property; but this was never objected to before the Court of Review. It has been contended, also, that the equity of redemption of this mortgaged property was not in the bankrupt at the time of his bankruptcy, but in the assignee under the Insolvent Debtors' Act; and reference has been made to *Ex parte Jackson (a)*, to show that there is no jurisdiction in bankruptcy to compel such assignee to join in a conveyance to the purchaser. In answer to this objection, it may be urged, that the party, in whom the estate of the equity of redemption is vested, is substantially a trustee of the bankrupt for the benefit of his creditors, and not a mere stranger, over whom the Court could have no control. But in whatever light he may be considered, we say, that the appellant cannot now raise that objection to the validity of the Commissioners' order. [Lord Commissioner *Shadwell*. May not a purchaser under a decree show that the decree is void?] Not if the party, as in this case, has expressly waived the objection. Again, it has been contended by the other side, that although before the establishment of the Court of Review an order of the Commissioners, made in pursuance of the General Order of the 8th March 1794, might have been treated as a judicial order for the sale of the mortgage, yet that it cannot now be regarded in that light. But by the 2d section of the 1 & 2 Will. 4. c. 56., the Court of Review is substituted for the previous jurisdiction of the Lord Chancellor in bankruptcy; and it is expressly declared, that that Court shall have power to hear and determine, order, and

(a) 5 Ves. 357.

allow, all such matters in bankruptcy as then usually were, or lawfully might be brought, "by petition or otherwise, before the Lord Chancellor, whether such matters may have arisen in the said Court of Bankruptcy, or elsewhere." By the 12th and 13th sections of the act, also, a fiat is substituted for every purpose; in lieu of a commission: and, by the 16th section, all the laws and statutes, rules and orders, then in force relating to bankruptcy, are declared to extend to all proceedings under fiats issued under that act, to all intents and purposes whatever, as if every such fiat were a commission of bankrupt. But the decision in *Ex parte Gould* (a) is an express authority for the order now appealed against; nor is there any case to be found in the books, where it has been held to be necessary to file a bill for the specific performance of a contract, which has been entered into under a sale directed by the order of the Commissioners. The party here purchases under an order of the Court of Bankruptcy, takes possession under that order, and grants a lease under it; and yet it is said, that the Court of Review, invested with all the previous jurisdiction in bankruptcy, can make no order on him to compel him to complete his contract. A party, who bids at a sale before the Master under an order of the Court of Chancery, has always been held to be within the jurisdiction of that Court. Why? Because he comes in under the decree. This principle is recognized in *Ex parte Partington* (b) and *Ex parte Green* (c), which are referred to in a note to the case of *Ex parte Gould*. Nor can there be any reason why, if the Court of Review has power to order the sale of the bankrupt's mortgaged property, it has not also jurisdiction to enforce a specific perform-

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(a) 1 G. & J. 231.

(b) 1 Ball. & B. 209.

(c) 1 Atk. 202.

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ance of the contract by the party, who purchases under the previous order of the Court. When the title is accepted, and the purchaser is in possession, and the only thing to be done is to pay the purchase-money,—may not the Court of Review compel the payment? In *Ex parte Hawkins (a)*, where a purchaser, who had bought a lease under an order of the Court, prayed that the assignees might be ordered to execute an assignment of the property, and the bankrupt to deliver up possession, Sir *J. Leach* made the order as prayed; and, on the bankrupt refusing to deliver up possession, the Lord Chancellor afterwards ordered him to be committed.

There is another class of cases, also, that involves the question of jurisdiction as to specific performance. Suppose a vendor has contracted to sell an estate to the bankrupt before his bankruptcy, but no conveyance is executed, nor any of the purchase-money paid,—the vendor has a right to come in under the commission, and insist that the estate shall be sold under an order of the Court, and that the purchase-money shall be paid to him, with liberty to prove for the difference: *Ex parte Gyde (b)*.

June 6.

Mr. *Jacob*, in reply. With respect to the objection to the form of proceeding in this case being by petition, instead of special case, the answer is, that although the 3d section of the act of parliament directs the appeal to be on a special case, it is only “except the Lord Chancellor shall in any case otherwise direct.” It is sometimes inconvenient that the appeal should be by special case; and therefore the Lord Chancellor has in one instance ordered the appeal to be by petition, instead of special case; *Ex parte Keys (c)*. Suppose a

(a) Mont. & M. 115. (b) 1 G. & J. 323. (c) 3 Deac. & Ch. 267.

man is stated to be *indebted* to another; the existence of the debt is a compound question of law and fact; so, in like manner, is the *acceptance* of title; and we contend here, that the Court below has drawn an erroneous conclusion, in point of law. It is said, that a waiver of objection to the title amounts to a waiver of all objection to the jurisdiction; but this we deny: for where, on a bill for specific performance of the contract of sale of a mortgaged estate, it turns out that there is a second incumbrancer, and the purchaser waives all objections to the title, that does not give the Court jurisdiction over the second incumbrancer. But the very objection we make to this order is, that it declares that *Barrington* the younger had accepted the title. Let it be assumed, that the day before he executed the lease to *Arden* the Court had then no jurisdiction, and that he accepted the title on the following day, when he executed the lease;—does that mere circumstance give the Court a jurisdiction, which it had not on the day before? We also insisted, before the Court of Review, that the original order of the Commissioners was bad, besides the want of jurisdiction in the Court of Review. *Ex parte Gould* (a) is certainly a most extraordinary case, and the only one of its kind; and the case of *Ex parte Partington* (b), referred to in a note to *Ex parte Gould*, was dismissed with costs; and *Ex parte Green*, the other case referred to in the note, has no application to the present case. *Ex parte Gyde* (c) was determined on the same principle as that which governs the Court in determining the claim of an equitable mortgagee. In the common case of short bills, if a party gets possession of goods belonging to a bankrupt,

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(a) *Suprà.*
 VOL. IV.

(b) *Suprà.*

(c) 1 G. & J. 323.

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the Court cannot compel him to give them up to the assignees, in the same manner as it could compel the surrender of them by the assignees, if they had got possession of them. And yet the interests of the assignees, as officers of the Court, are as much affected in that instance as in this. One of the judges in the Court of Review says, that when a party, on the hearing of a petition, argues on the merits, he, by doing so, gives the Court jurisdiction. But this, it is submitted, is clearly not the case, unless the party expressly consents to waive all objection to the jurisdiction; an objection of this nature cannot be waived by an act *in pais*.

Then, with respect to the power of the Court over the assignee, under the Insolvent Debtors' Act,—can it be contended, that the assignee under a fiat in bankruptcy can call upon the Court of Review to compel the assignee of the insolvent to convey away any property which is legally vested in him? He is a trustee only for the creditors under the insolvency, and not for any subsequent creditors.

It has been contended by the other side, that if the Commissioners duly exercise the power of sale given them by Lord *Loughborough's* Order, it is the same as if made by the Court of Review. But suppose an order is made by the Court of Chancery to take an account of the personal estate of an intestate, and the Master by a mere blunder puts up real property for sale, this is not a judicial sale of such property, and the Court would say, this is not a sale by our authority. [Lord Commissioner *Bosanquet*. Was the petitioning creditor's debt inserted in the bankrupt's schedule, when he took the relief of the Insolvent Debtors' Act?] It was; and therefore we say, that the equity

of redemption in this property being vested in the provisional assignee of the Insolvent Court, Lord *Loughborough's* Order does not apply to this case, but only to those cases where the bankrupt's property is legally vested in the assignees under the bankruptcy.

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There was one argument used in the Court below, on behalf of the assignees, to this effect,—that we ought to be content with the mortgage term, and that it was a matter of indifference to us, whether we got the fee-simple of the property, or the mortgage term. But every purchaser has a right to insist upon the title he contracts for; and the law draws a wide distinction between a tenant in fee-simple, and a mere termor.

In reply to the assertion made by the other side, that the acceptance of the title by the appellant is merely *a matter of fact*, it is proper to inquire, what is acceptance of title? Is it any thing but such conduct as would induce a Court of Equity to say, that it does not lie with a party to set up any objection to the title? It means, that one party has done certain acts of such a nature, that it would be inequitable towards the other party, that he should afterwards object to any defect of title. It does not depend on a single act, but upon the view that a Court of Equity will take of the whole circumstances of the case. It is a compound question of fact and equity, as in a Court of Law it would be considered a compound question of law and fact. The jurisdiction of the Lord Chancellor in bankruptcy, in a case of this description, is similar to that exercised by the Court of King's Bench in controlling the conduct of a judge on a previous trial at nisi prius, when the Court exercises its judgment both on the facts and the law of the case. [Lord

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Commissioner *Bosanquet*. A demurrer to evidence, perhaps, comes nearer to the case you put, than any other; for this involves a mixed question of law and fact (*a*). But that proceeding is not often had recourse to in the present day.] What may still better illustrate the matter is, where a bill of exceptions is tendered to the direction of a judge, on the trial of an action against a party for not completing a contract for the purchase of an estate; when the ground of the defence is, that the plaintiff's title is bad, and the judge determines that the defendant has accepted it. In that case, the question to be argued on the bill of exceptions would be compounded of fact and law. So here, this Court must determine what is fact, and what law. If the Court should, however, think that the question is one entirely of fact, and ought to have been brought on by special case, the respondent ought then to have moved to discharge the Lord Chancellor's order for proceeding by petition of appeal, and to direct it to be brought on by way of special case (*b*). But how could all the questions involved in this appeal be brought on by special case? One important question relates to the jurisdiction of the Court of Review, in directing a specific performance of the contract by the present appellant. The Court says, it has jurisdiction; it would be absurd then for the judges to sign

(*a*) A demurrer to evidence admits the truth of every fact that has been alleged, but denies the sufficiency of them all, in point of law, to maintain or overthrow the issue, drawing the question of law from the cognizance of the jury, to be decided by the Court. 3 Bl. Com. 372.

(*b*) A motion was actually made by Mr. *Swanston* to discharge the Lord Chancellor's order, as soon as the appeal was called on for hearing; but Lord Commissioner *Shadwell* said it did not appear to him then, that the Lord Chancellor had not properly made the order, and he therefore directed the case to proceed.

a special case, which denies that jurisdiction. In *Ex parte Keys*,^(a) Lord Brougham says, "I have now heard enough to decide that this is a proper case to be brought before me on petition, and not on special case. It might have consumed weeks before both parties could have agreed on the facts, and have settled the special case." So the question in this case is not an error of fact, but of law; and this appears from the reasoning of the Judges of the Court of Review in delivering their respective judgments, which we say are erroneous in point of law. Thus, his Honor Sir G. Rose, at the conclusion of his judgment, says: "The only inference I can draw in this case, from the granting of the lease by the purchaser, is, that he had the fulfilment of his contract in view at the time he executed the lease, and that he intended to waive all objections to the title." Now we contend, that the execution of a lease, or taking possession of the property by the purchaser, is neither of them, *per se*, a waiver of objections to the title, but that both these matters are capable of being rebutted and explained. The real title here is in the assignee of the Insolvent Court; and as he is not a trustee for the creditors under the bankruptcy, but for the creditors under the insolvency, the assignees under the bankruptcy cannot call upon him to join in a conveyance to the purchaser. For, even if the purchaser had accepted the title, he would be only bound to take such title as the seller could give him, by compelling all necessary parties to convey; but the provisional assignee of the Insolvent Debtors' Court is not under his control, and therefore he has no means of giving us an effectual conveyance.

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(a) 1 Mont. & A. 237; S. C. 3 D. & C. 271.

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The order of the Court of Review, after assuming that the purchaser had waived all objections to the title, refers it to the Registrar to settle a conveyance by *all proper parties*. Now, under this order, the purchaser might go before the Registrar, and insist upon the very objection he is presumed to have waived, namely, that the assignee of the Insolvent Court is a necessary party to the conveyance. The order is therefore inconsistent with itself. But the case stands upon stronger grounds than this, notwithstanding the decision in *Ex parte Gould* (a). For, suppose two parties agree to refer a matter to this Court, which is not within its cognizance: will that give the Court jurisdiction? Then, how can it be said in this case, that the purchaser has given the Court jurisdiction, by accepting the title? Assume that he has done so, what jurisdiction has the Court of Review to deal with that acceptance, or compel the specific performance of a contract by a party, who is a perfect stranger to the fiat? Under these circumstances, we say, that the order of the Court of Review is absolutely void.

Cur. adv. vult.

July 13.

Lord Commissioner SHADWELL.—This was a petition of appeal, presented by *William Barrington*, the younger, the son of the bankrupt, praying for the reversal of an order of the Court of Review, by which the petitioner was ordered to complete a contract, into which he had entered for the purchase of certain mortgaged premises belonging to the bankrupt, and sold under an order of the Commissioners in the bank-

(a) *Suprà*.

ruptcy. The petitioner's objections to the order of the Court below were, that the assignees of the bankrupt could not make a good title to the property, as the equity of redemption was vested in the assignee under the Insolvent Debtors' Act, and that the Court of Review had no jurisdiction to compel the specific performance of a contract. (His lordship then recapitulated the facts of the case, and thus proceeded.) By the 3d section of the act of parliament (a), which constitutes the Court of Review, it is enacted, that "in all cases of appeal to the Lord Chancellor by virtue of this act, such appeal shall be on a special case, and in no other mode whatever; except the Lord Chancellor shall in any case otherwise direct." The form of appeal in this case was by *petition*, in pursuance of a special order of the Lord Chancellor obtained for that purpose. In the argument on the part of the appellant, no point was made as to whether evidence had been refused in the Court below, which ought to have been received, or whether evidence was there received, which ought to have been rejected. There being no objection raised on that point, it appears to us, that the Court of Review had full power to decide the question of specific performance, on the evidence before it; for there was evidence before that Court, that *W. Barrington*, the appellant, attended the sale of the property,—that he was declared the purchaser,—and that he had accepted the title, so far as to grant a new lease to *Arden*, the former tenant of the premises. The Court of Review had, therefore, before it sufficient evidence to enable it to draw a conclusion from the facts. Whether they would have done better, if they had decided differ-

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(a) 1 & 2 Will. 4. c. 56.

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ently, is not the question before this Court. The only question here is, whether an order for specific performance can be made by the Court of Review in bankruptcy. The order, which that Court pronounced in the present matter, was made on the authority of the case of *Ex parte Gould (a)*, which was decided by the late Master of the Rolls, when Vice-Chancellor, in 1822, and is reported in Messrs. *Glyn and Jameson's* Reports. There has been no reversal or impeachment of that case; and although that is the only authority in support of the present order, still, as Lord *Eldon* has said that the authority of even a single case, if not appealed from, ought not to be disturbed on slight grounds,—I am of opinion, that there is no reason to reverse the order of the Court of Review.

Lord Commissioner BOSANQUET.—I entirely concur in the judgment of my brother Lord Commissioner. I only think it necessary to say, that as there was evidence adduced in the Court of Review of the acceptance of the title by the petitioner, and as no objection was raised on this appeal as to the admissibility of that evidence, it must be inferred that the proper conclusion has been drawn by the Court below.

Appeal dismissed, with costs.

(a) 1 G. & J. 231.

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1834.

MEMORANDA.

The following gentlemen were this day called within the bar:—Mr. *Kindersley*, Mr. *Jacob*, Mr. *Wigram*, Mr. *Wakefield*, Mr. *Burge*, Mr. *Skirrow*, Mr. *Temple*, Mr. *Barber*, Mr. *Shepherd*, Mr. *Platt*, Mr. *Kelly*, Mr. *Spence*.

April 25,
1834.

The Warrant of his Majesty, throwing the Court of Common Pleas open to the Bar in general, was this day read aloud in Court by his Honor the Chief Judge.

January 12,
1835.

Ex parte BELL.—In the matter of RILEY.

MR. *WRIGHT* applied in this case that the fiat, which had been directed to a London Commissioner, might be superseded, and that the former petitioning creditor might be allowed to sue out a new fiat directed to Leeds. The ground of the application was, that the far greater majority of creditors resided at Leeds, and it would therefore be extremely inconvenient to work the present fiat in London.

April 25,
1834.
Where time for opening town fiat is nearly run out, Court will not, at instance of petitioning creditor, supersede it, and issue a country fiat for alleged convenience of creditors.

The COURT, however, finding that the time for opening the fiat had nearly expired, refused the application; otherwise it might afford a precedent for undue delay on the part of petitioning creditors.

1834.

June 24.

Though the rule of another Court for striking an attorney off the roll be produced, *semble*, an order nisi only can be obtained in this Court in the first instance.

In the matter of ROBERT MARK (a).

THIS was an application to strike a solicitor off the roll, for improper practice. He had been struck off the roll of the Court of Chancery for that purpose, and the rule of that Court was produced.

Mr. *Montagu*, in support of the application, said that the only doubt was, whether the solicitor ought to be served. He was at present keeping out of the way to avoid service. From the case of *Ex parte Yates* (b), it plainly appeared that a solicitor may be either struck off the roll, or re-admitted upon reading the rule for striking him off, or re-admitting him in any other superior Court. The case of *Re Smith* (c) is to the same effect.

The COURT directed that the practice of the common law Courts should be followed here (d), and made the rule nisi to be served in the usual way.

(a) See *ante*, 28. (b) 9 Bing. 455. (c) 1 Brod. & B. 522.

(d) In 1 Arch. Pr. by T. Chitty, 1st ed. p. 43, it is said, that if an attorney be struck off the roll of one Court, he may, upon the same grounds, be struck off the roll of another; and to support the application, it would, it seems, suffice merely to produce the rule of the other Court ordering him to be struck off. In *Ex parte Hore*, 3 Dowl. Prac. Ca. 600, and in *Ex parte King*, *id.* 41, it is said the Court will take judicial notice of an attorney's being on the roll.

1834.

Ex parte RENSHAW.—In the matter of **WILD.**

July 25.

THIS was an application by the assignees for the distribution of unclaimed dividends, and the question was, how the amount of interest, which had accrued by the investment of the dividends remaining unclaimed, was to be disposed of?

The interest made by the investment of unclaimed dividends, does not belong to the general estate, but is divisible among the creditors claiming the hitherto unclaimed dividends.

Mr. Booth, for the petitioner.

Mr. Wray, for **Mr. Bloxam**, a creditor, who now applied for his dividend, and claimed the interest made arising from it.

Mr. Barber (Registrar) referred the Court to a MS. case of *Ex parte Doxat*, in the matter of *Bethenan*, decided by Lord *Lyndhurst*, 18th November 1830, where it was held that the interest did not pass to the estate, but belonged to the creditors claiming the dividends.

The Court made the usual order nisi for advertisements, &c.

The case now came on upon further directions, when the Court made the order conformable to that in *Ex parte Doxat*.

January 22,
1835.

1834.

In the matter of HUMPHREY.

July 26.

Fiat unopened.
Description of
bankrupt's
parish allowed
to be amended.

MR. BURTON applied for leave to amend the fiat in this case, the bankrupt's residence being described as being in a wrong parish. The fiat not being opened,

The Court granted the application.

September 13,
22, and 23.
Before *Erskine*,
C. J.

Ex parte LAVENDER.—In the matter of **LAVENDER**.

The bare neglect to keep an appointment to meet a creditor does not amount to an act of bankruptcy.

IN this case the bankrupt petitioned to supersede the fiat, and to stay the advertisement in the Gazette, on the ground that he was not a trader, and that he had not committed any act of bankruptcy.

A bankrupt, pending a negotiation for the loan of money, is arrested in the country and discharged on bail. He at the time promises to meet the creditor and his solicitor on the following day and give security. On the following day, however, he goes to London, in order to procure part of the loan, and therewith to pay the creditor the debt instead of giving security. He writes to the solicitor stating the fact and its object, and promises to return in a day or two and pay the debt. He is, however, detained longer in London, *bond fide*, upon the same negotiation: Held, that evidence of the intent to delay his creditor was rebutted.

The facts connected with the alleged act of bankruptcy, which was that of absenting himself from his place of business, (the bankrupt being a farmer, residing near Harpenden, in Hertfordshire,) and breaking an engagement to meet a creditor, were, that the bankrupt being in treaty for a loan of money upon mortgage, and which treaty had been some time pending, a bill accepted by him became due, and he was applied to by the holder's solicitor for payment; upon which the bankrupt acquainted him with the pendency of the negotiation, and, begging a little indulgence, stated that he would immediately go up to London with a view to get the treaty for the loan immediately completed, when he would forthwith pay the bill. The bankrupt went to

London accordingly, and the negotiation being on the point of completion, he returned to the country. He then found that a writ, then in the officer's hands, had been issued against him on his acceptance. Upon this information the bankrupt surrendered himself to the officer, and the drawer of the bill becoming bail for him, the bankrupt told him and the holder's solicitor, that he would wait on them the next day and give ample security for the amount due. Immediately after, thinking that by going up to London again he could get part of the money, the loan of which he had been negotiating, and could so pay the money at once, he went to London, and on his arrival wrote back into the country to the solicitor for the holder of the bill, and who had caused his arrest, stating the fact of his going and its object; and that he could not keep his engagement for the following day, but hoped to be able to do so in a day or so, when he would pay the money. Being *bonâ fide* engaged in forwarding the pending negotiation, he however remained in London for several days. Meanwhile the fiat issued.

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Mr. Serjt. *Wilde*, and Mr. *Montagu*, for the petitioner.

Mr. *Temple* for the respondent, the petitioning creditor.

Mr. *Temple*. The petitioners have filed no affidavits to impeach the validity of this fiat or in support of the petition. But the petitioner has given us notice that he intends to examine witnesses *vivâ voce*. I therefore ask that the hearing of this petition may be adjourned

September 13.

Where petitioner files no affidavits in support, but two days before hearing served notice to examine witnesses on respondent 20 miles from

London, Court refused application of respondent to postpone hearing, so as to procure witnesses in answer, till after petitioner's witnesses were examined.

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so as to afford us an opportunity of producing witnesses in answer to them. The notice was only served on the petitioning creditor at eight o'clock on the 11th instant, and he resides 20 miles from London.

Upon *prima facie* case, *vivá voce* examination ordered and advertisement of adjudication postponed.

ERSKINE, C. J.—Would it not be better, to avoid that which may prove a useless expense, that, being here, the witnesses of the petitioner should first be examined. Upon the *prima facie* case made out before me on a prior occasion, I ordered a *vivá voce* examination, and that the advertisement in the Gazette should be stayed. If, on their examination, the petitioner's witnesses establish a *prima facie* case for a supersedeas, it will then be time to consider whether we will require witnesses to be examined on behalf of the respondent.

Upon bankrupt's petition to supersede, depositions of trading and act of bankruptcy read in Court, so as to give him an opportunity of answering them.

Mr. Serjt. *Wilde*, on opening his case, suggested that as it was impossible to meet every suppositious trading and act of bankruptcy, and as the petitioner was in the dark as to those on which the fiat was founded, not having seen the proceedings, it would be advisable that the depositions as to the trading and act of bankruptcy should be now read ; and, upon the Chief Judge suggesting that they must ultimately be read, and Mr. *Temple* acquiescing, the depositions were read accordingly.

The act of trading relied on was the purchasing of sheep by the bankrupt to be depastured on another person's land for the consumption of turnips, and the sheep were afterwards to be sold for the joint benefit of the bankrupt and the party on whose land they were depastured.

Mr. Serjt. *Wilde*, and Mr. *Montagu*, contended that

this was not a sufficient trading. There was only one isolated case of trading, and no evidence could be adduced of any intention to trade in this manner generally. In *Stewart v. Ball* (a), a farmer who occasionally bought hay, corn, horses, &c. with a view to gain profit thereby, was held not to be a trader within the bankrupt laws. So here, as in that case, the fact of his buying and selling were incident to the occupation of the farm.

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ERSKINE, C. J.—A single act of buying and selling is sufficient, if there is evidence of an intention to continue it, which evidence, I think, exists in the present case. Your strongest point is certainly against the act of bankruptcy, and I should recommend you to resort to that.

Single act of buying and selling by farmer, with evidence of intent to continue, sufficient act of bankruptcy.

The act of bankruptcy was then gone into, and in the course of the evidence thereon it appeared, that one of the depositions in support of the act of bankruptcy was sworn to by the drawer of a bill not then due, and accepted by the bankrupt, and he therein swore that he was not a creditor.

September 22.

The drawer of a bill accepted by the bankrupt, but which he had indorsed over, and which was not yet proved against the estate, swore to a deposition in support of the fiat, stating himself therein not to be a creditor: Held, in the face of that statement, that his deposition could not be rejected on the ground of his being a creditor.

Mr. Serjt. *Wilda*, and Mr. *Montagu*, for the petitioners, contended, that inasmuch as the witness might be called on to pay the bill, he was in a manner a surety for the bankrupt, and was therefore a creditor and an interested party. But

ERSKINE, C. J. said, that on the face of his oath he could not be presumed to be a creditor, and that therefore his deposition might be read.

But being subsequently examined *videlicet*, and admitting the facts:—Held, that as he might

(a) 2 B. & P. N. R. 78.

be called on to pay the bill, and would have the option to prove against the estate, he was an interested party, and therefore not examinable.

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This was accordingly done. He was subsequently, however, called and examined, when, in answer to a question put to him by Mr. Serjt. *Wilde*, he replied, that "he had the bill in his hands about a week or ten days before it fell due; but he had since paid it away."

Mr. Serjt. *Wilde* then contended that it was manifest this witness would be, at least, liable to pay the holder the difference between the amount of the bill and the dividends to which the holder would become entitled. In respect of that difference he had a claim against the bankrupt. He was therefore too closely interested as a creditor to be a good witness.

Mr. *Temple*. The practice now universally adopted in bankruptcy is to read the affidavits of all persons, whether interested or not; so also to examine them. This practice has often been adopted in this Court, and there are many instances in which the bankrupt himself, though clearly interested as regards a surplus, has been examined. But as regards this particular question, the witness proposed is not an interested party; he is not a creditor. True it is he may be called upon to pay to the holder of this bill some part of it; but he has sworn himself not to be a creditor,—he has not of course yet made, and may never make, any claim against the bankrupt's estate. In the case of *Williams v. Stevens* (a), a witness was examined who had a considerable demand against the bankrupt, but had not proved under the commission. It was objected that he was an incompetent witness. But Lord *Ellenborough* said,

(a) 2 Camp. 301.

"A creditor is clearly an incompetent witness to increase the fund, out of which he may receive a dividend; but I do not see why he should not be allowed to prove what barely goes to support the commission, of which he has not availed himself. It may be quite as advantageous for him to be allowed to sue his debtor as a solvent person, as to receive a dividend under a commission of bankruptcy sued out against him." And his evidence in that case was admitted.

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LAVENDER.

Mr. Serjt. *Wilde* in reply. Whatever may be the practice with regard to affidavits, the argument of the other side cannot hold good in respect to *vivâ voce* examination, where questions arise as to the admission or rejection of evidence. The 1 & 2 W. 4. c. 56. s. 3. has provided that cases shall be heard and determined by this Court, subject to an appeal to the Lord Chancellor on matters of law and equity, or on the refusal or admission of evidence only. If this Court then determines not to abide by the rules laid down in all other Courts as to the admission of evidence, and examines parties whether interested or not, the act of parliament, as far as regards this part of the third section, becomes perfectly nugatory; and the Court will adopt rules which it was never the intention of the legislature to sanction. The witness now proposed to be examined has an undoubted interest in the funds of this bankruptcy. He may avail himself of those funds, or not, at his option. But whether he will do so is not the question, since I take it to be clear he may do so. He is, therefore, an interested witness, and cannot be examined.

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—
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ERSKINE, C. J.—There is no doubt but that the Court is in the habit of receiving the affidavits of all parties, whether interested or not; and of hearing them read *quantum valeant*. But authorized as we are to take evidence *vivá voce*, by the act giving birth to this Court, I cannot but think that, in doing so, we ought to abide by the rules adopted by other Courts from sound experience; and that we should not allow witnesses to be examined *vivá voce*, whose evidence would be rejected elsewhere. This is a point of considerable importance, which I do not think has been raised here before, and I will therefore take till tomorrow to consider of it.

Cur. adv. vult.

Sept. 23.

ERSKINE, C. J.—Had there existed an absence of all authority upon this subject, I should rather have inclined to the expediency of examining this witness, and to have regarded the objection as made to his credit, from the peculiar relation in which he stands to this bankrupt, rather than to his competency as a witness. For I think it much depends on that relationship, whether his interest be inimical to the fiat or not. One creditor may have an interest to supersede a fiat, especially a creditor by specialty; while another, a simple contract creditor, by reason of the claims of judgment creditors, may have an interest in supporting it. But the general rule is, that a creditor cannot be a disinterested witness, and the principle of that rule is, that a creditor must necessarily have an interest to support the fiat. The frequency of decisions to this effect, preclude me from exercising that discretion which, in the absence of all authority on the subject, I might have thought fit to exercise

the other way. The case of *Williams v. Stevens* (a), which has been cited, shows what the general rule is, though the circumstances of that case were held to form an exception to it, and such appears to be the rule also from the case of *Ex parte Osborne* (b). To establish that this case forms an exception to that rule, *Williams v. Stevens* has been cited; that case, however, appears to have been decidedly overruled; for in *Crooke v. Edwards* (c), which was subsequently decided by Lord *Ellenborough*, he altered his opinion, and allowed the objection; because, as he observed, "the commission was to be considered as a benefit to the witness, since it brought a divisible fund within his reach, and by supporting the commission he enlarged the means of satisfaction;" and, from his judgment, it would appear that a similar opinion had been expressed by Lord *Eldon*. In the note appended to the case of *Ex parte Osborne* (d), it also appears, that in another case which was heard before him during the same sittings, wherein *Williams v. Stevens* was cited, Lord *Eldon* observed, that it was not enough that the creditor had not availed himself of the commission; to make him a competent witness, it ought to be certain he never would." So, upon the same point, Chief Justice *Gibbs*, in the case of *Adams v. Malkin* (e), says, "a commission of bankruptcy is evidently favourable to the creditors. A much more summary and effectual remedy is thereby given them, than an action at law; and, as it passes the whole of the bankrupt's real as well as personal estate to the assignees, it immediately appropriates to the satisfaction of his debts, that which can only be reached re-

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LAVENDER.

Williams v.
Stevens, 2 Camp.
301, is over-
ruled.

(a) 2 Camp. 301.

(b) 1 Rose, 387; S. C. 2 Ves. & B. 177.

(c) 2 Stark. 302.

(d) 1 Rose, 392.

(e) 3 Camp. 544.

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LAVENDER.

motely and partially by common law process. I conceive, therefore, that a creditor has an interest to support the commission, under which he may prove and receive a dividend." And, indeed, it is a general principle that the bankrupt laws were established and maintained in every respect, except in one or two instances, as being beneficial to creditors. So that upon the broad principle it is hardly possible to say a creditor is disinterested when he comes to support the fiat.

From the authorities I have alluded to, it is clear, then, that upon an issue at law this witness would be deemed incompetent. But it is urged, that in bankruptcy the rule has not been considered so strictly binding; and that this question, arising on a petition to supersede, induces a distinction sufficient to form an exception to that rule, if it here existed. I cannot coincide in this reasoning. Whatever might have been the practice in bankruptcy before the Lord Chancellor, prior to the establishment of this Court, a different state of circumstances has now arisen. The Lord Chancellor had no power of hearing *vivá voce* evidence, nor of trying an issue. If a point of law arose, it became necessary for him to direct an issue to a common law Court; and it was for the purpose of enabling him to form a judgment whether it would be proper for him to send the case to a jury, that a habit was fallen into of hearing the affidavits of all parties indiscriminately. He did not receive them in the light of strict legal evidence, but as a guide to his own mind in directing the issue.

I am, therefore, of opinion, that on examining a witness *vivá voce*, we are sitting on the trial of an issue, and must abide by the rules of evidence which a

Court of law would adopt, were that the tribunal before which the examination was proceeding. The witness now before the Court is decidedly an interested party. He is a creditor, and therefore incompetent; and I am bound to supersede this fiat, unless other evidence be adduced by the petitioning creditor.

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LAVENDER.

The objection was allowed, and other evidence was gone into. From that evidence the facts mentioned at the commencement of this case were adduced, whereupon the argument on the merits was proceeded with.

Mr. Serjt. *Wilde*, and Mr. *Montagu*. The circumstances which the evidence has disclosed do not, we contend, amount to a sufficient act of bankruptcy. All that is proved is, that there was a failure to keep an appointment; and the presumption that it arose from an intent to delay the creditor is amply rebutted. The mere breach of an engagement of this nature has never been held *ipso facto* to amount to an act of bankruptcy. It may be admitted that it constitutes a *prima facie* case against the bankrupt; but he is at liberty to rebut the presumption arising from this circumstance, if he is able. In *Schooling v. Lee* (a) the trader had been arrested, and obtained his liberty upon an undertaking that he would subsequently attend and execute a bail-bond. He broke his engagement, however, and on these facts Lord *Tenterden* observed, "That the party absented himself, not in order to avoid a creditor with whom he had made an appointment, but merely to avoid the execution of a bail-bond;" and this he held to be no sufficient act of bankruptcy.

(a) 3 Stark. 149.

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LAVENDER.

In *Toleman v. Jones* (a) it was held, that the bare circumstance of not keeping an appointment, without evidence of the intent to delay creditors, was not sufficient to establish an act of bankruptcy. In that case the judgments go a considerable length in showing that the *onus* of proving the intent to delay rested on the party seeking to establish the bankruptcy, and that the mere circumstance of the breach of engagement did not raise an inference which the bankrupt would be called upon to rebut. So also it was held in *Key v. Shaw* (b).

We admit that there are many cases where, coupled with the evident intent to delay creditors, the breach of such an engagement has been held sufficient to establish an act of bankruptcy, as in *Robson v. Rolls* (c), *Butcher v. Wroughton* (d), and *Widger v. Browning* (e); and in the present case we might safely admit to be correct the doctrine laid down in the last case, viz. that the bare circumstance afforded such an evidence of an intent to delay, that the *onus* lay on the trader to show that such was not his intention. For what are the facts here? *Lavender* promised to attend to give security. Thinking it better, however, to get some of the money he had long previously been expecting to receive, he went to London, where he remained longer than he expected, having in the meantime written to his creditor to state what he had done. Here, therefore, instead of intending to delay the creditor, his object was to pay him at once in money, rather than to postpone him by giving security,—to accelerate payment rather than to delay it,—and it would be impossible for

(a) 9 Moore, 24 ; S. C. 2 Bing. 2, nom. *Tucker v. Jones*.

(b) 1 Moo. & Sc. 462.

(c) 9 Bing. 648.

(d) Mont. & Mac. 438, in note.

(e) 9 Dowl. & Ry1. 306.

a jury to draw any other inference. This, therefore, is no act of bankruptcy.

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LAVENDER.

Mr. Temple cited *Dickenson v. Ford* (a), to show that the bare neglect to keep an engagement to meet a creditor and put in bail, was of itself an act of bankruptcy.

ERSKINE, C. J.—The preponderance of authority justifies me in saying, that in this kind of case the whole question turns on what was the intent of the party when he failed to keep his appointment? If, from the facts, a jury can fairly infer that the delay of creditors was intended, then no doubt that failure to keep an appointment amounts to an act of bankruptcy, according to several of the cases which both sides have cited. But it cannot for a moment be contended that the bare failure to keep an appointment alone constitutes a sufficient foundation for a fiat. The necessities and casualties of life are too numerous and uncertain to admit of such a doctrine; and even if the *onus* of rebutting an inference created by such failure is thrown on the bankrupt, according to the case of *Widger v. Browning*, the circumstances of this case are quite sufficient to rebut any such inference. It is manifest here that the intent was not to delay the creditor, but to benefit him by immediate payment in money, in preference to postponement by the mere giving of the securities proposed. I am therefore of opinion that no act of bankruptcy is established in this case, and that the fiat must be superseded.

The fiat was thereupon superseded, and with costs.

(a) Barnes, 106.

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Ex parte
LAVENDER.
January 28.
Before the
whole Court.
Although upon
a fiat being su-
perseded the
Lord Chan-
cellor has is-
sued his con-
firmatory order,
the Court of
Review, upon a
proper case on
re-hearing, can
in effect order a
procedendo, by
means of its in-
timation to the
Lord Chan-
cellor.

Mr. *Temple* now applied that the former petition in this case might be reheard, and that a writ of *procedendo* might issue, the parties having since discovered facts which he thought would induce the Court to come to a different determination. Upon the former order, superseding the fiat, the usual confirmatory order of the Lord Chancellor had been issued, and the question was, how the parties were to proceed? It appeared to him that it was questionable whether the writ of *procedendo* could now issue; and whether, after the Lord Chancellor had issued his confirmatory order, this Court could rehear that petition? In *Ex parte Anjer* (a), where a second fiat was issued, the petition prayed a reversal of the order of the Lord Chancellor annulling the first, and for a writ of *procedendo* as to it, and that the second fiat might be annulled. There the Chief Judge intimated (b), that though the Court had no power to reverse the order of the Lord Chancellor, it could nevertheless intimate its opinion on the subject to his lordship; and he would then act in accordance with the suggestion of this Court. But upon the merits of the case that petition was dismissed.

The COURT intimated that a petition for re-hearing might be presented, together with a supplemental petition setting forth the facts newly discovered. If, in the result, a *procedendo* was warrantable, there would be found no difficulty in directing it, or something analogous to it; and, with regard to reversing the Lord Chancellor's order, the intimation of opinion given in *Ex parte Anjer* would apply in this case.

(a) 2 Deac. & Ch. 67.

(b) *Id.* 74.

The petition for re-hearing was accordingly presented, stating that the former order had been obtained by perjury; and it prayed that it might be rescinded, and for leave to apply to the Lord Chancellor to rescind his order for a supersedeas, and that the former fiat might be proceeded with.

Fresh evidence as to the act of bankruptcy was tendered.

Mr. Temple, and *Mr. Booth*, now appeared for the petitioning creditor.

Mr. Whitmarsh, on behalf of the bankrupt, offered no opposition to any order the Court might make.

Sir G. ROSE.—All we can now do is to give you leave to issue a new fiat. If you apply for a re-hearing, and to rescind the former order upon the same evidence as was before the Court when the order was made, we might be inclined to listen to it. But we cannot rescind that order upon fresh evidence.

Sir J. CROSS.—After a lapse of four months, during all which time the alleged bankrupt has been carrying on business again as a solvent person, a re-hearing is sought for upon evidence which might, with due diligence, as well have been before the Court then as now. Such applications are never attended to in Courts of Law on moving for new trials, unless the further evidence was called for, by the party tendering it having been taken by surprise on the former trial, by reason of evidence offered by the other side. If it was alleged that the bankrupt had in any way kept back

1835.

Ex parte
LAVENDER.

February 16.

In the absence
of *Erskine*, C. J.

The Court will in general re-hear petitions and rescind former orders upon fresh evidence tendered, but not where such orders are made upon petitions to stay certificate, or to supersede or annul fiat.

1835.

Ex parte
LAVENDER.

the evidence now tendered, or if perjury had clearly been resorted to, we should be desirous of rehearing the petition. But that is not the case; and, looking at all the circumstances before us, I feel no inclination to grant the prayer of the present petition. The petitioning creditor is not precluded from applying for a new fiat, but we cannot rescind our former order.

Sir G. ROSE.—When the former order was made, the bankrupt was as inimical to the fiat as could well be, and showed the strongest possible case against it. Now, however, (for what reason it is not very difficult to understand,) he appears to consent, as it were, to the present application. This renders the case somewhat suspicious. In general there is no doubt that petitions may be reheard, and orders rescinded upon fresh evidence since discovered. But petitions to stay certificates, and for annulling fiats, must form exceptions. If the petitioning creditor come here with a sufficient case, and asks for a new fiat, we will grant his application; but we cannot, under the circumstances, revive the former one.

The petition was dismissed with costs, but without prejudice to an application for a new fiat.



1834.

Ex parte ROBINSON.—In the matter of CASE.

THIS was a petition by a partner of the bankrupt, praying liberty to prove, and that the certificate might be stayed until the partnership accounts could be taken. The petition stated, that the petitioner was a partner of the bankrupt in a speculation in goods sent to Africa, and was in solvent circumstances, and had paid and expended large sums of money in payment for the goods, to the extent of 1600*l.* and upwards, and that he had never been able to come to a settlement of the dealings, or to get any account settled. That the petitioner had applied to the Commissioner to prove, but for the reason that the accounts between the petitioner and the bankrupt were unsettled, the Commissioner had refused to admit the proof. This was the only statement as to the petitioner being a creditor.

Mr. *Temple*, for the petitioner, produced the affidavit of service on the assignees.

Mr. *Montagu* appeared for the bankrupt, and objected that the petition did not state the petitioner to be a creditor.

Mr. *Temple*. The affidavits state the fact in direct terms; and even if the petition contains no such direct charge, the inference to be drawn from it is no other than that the petitioner applies in the character of a creditor; and were that not the case, it would amount merely to an objection of such a nature, that the Court

September 30.
Before
Erskine, C. J.

On petition to stay certificate, it must appear from the petition itself that the party applying is a creditor; if it appear merely inferentially, that is sufficient.

If it merely so appear from the affidavits in support, that is insufficient; and no amendment of petition to stay certificate allowed.

A former partner, there being partnership debts unpaid, cannot petition to prove the balance of accounts; *a fortiori* not to stay certificate.

On petition to prove and stay certificate, it is not necessary to charge directly what debt was tendered for proof to the Commissioner, or when it was rejected.

1834.
Ex parte
ROBINSON.

would allow it to stand over for amendment. But, in *Ex parte Springett* (a), where the petitioners appeared to be creditors merely from the title of the petition, it was held sufficient, although the title forms no substantial part of the petition, and there was no allegation in the petition itself of their being creditors.

Mr. Montagu, *contrà.*, cited *Ex parte Cundall* (b). In that case it was held to be insufficient that the petitioner's case should only be contained in the affidavits. In *Ex parte Cutten* (c), a petition to stay a certificate presented by the provisional assignee, who was not stated to be a creditor, and by the assignees, who were stated to be such in the petition, but which statement was not supported in the affidavit, was dismissed.

ERSKINE, C. J.—In *Ex parte Cutten*, the ground of the dismissal of the petition in the mind of Lord Eldon seems to have been the laches of the petitioners; and in the case of *Ex parte Cundall* the objection was maintained, because neither the petition itself, nor the affidavits in support of it, showed any ground to stay the certificate. No ground for doing so appeared till the affidavits in reply were filed. But, in this case, I certainly think, that although the petition does not, in precise words, state the petitioner to be a creditor, that circumstance is inferential from the whole tenor of the petition, which seeks to stay the certificate in order that he may prove; from which it must be inferred he comes as a creditor; and this, in my opinion, is sufficient. Were it however otherwise, the omission could not be rectified by the statements in the affidavits; for it must

(a) 1 Dea. & Ch. 380. (b) 1 G. & J. 37. (c) Buck, 68.

appear from the petition itself that such is the character in which he claims. Neither could we, as this is a petition to stay a certificate, allow of any adjournment for the purposes of amendment. But I think enough is already stated on the petition; otherwise, from a general feeling against this kind of petition in my mind, I should be very ready to dismiss it. And if the inference would not arise, that the party was a creditor, as if the ground on which the stay of the certificate was sought was merely that of gaming by the bankrupt, I should at once dismiss the petition.

1834.

Ex parte
ROBINSON.

Mr. *Montagu* then objected that the petition did not state when the proof was rejected, or when he first applied to prove. He may have been guilty of laches in not seeking to prove before the consent of creditors to the certificate was obtained, and the Court would never sanction a creditor in lying by and neglecting to tender his proof at the earliest period; *Ex parte Cutten (a)*, *Ex parte Smith (b)*, *Ex parte Bostock (c)*, and per Lord *Eldon* in *Ex parte Anderson (d)*.

Mr. *Temple*. The petition shows that the fiat only issued on the 9th of July last, which at once precludes the possibility of any delay or laches having existed.

ERSKINE, C. J. thought, that although the petition was very loosely drawn, yet there was enough stated on it to warrant them in going into the merits.

(a) Buck, 68.

(c) 1 Dea. & Ch. 383.

(b) 1 Gl. & J. 195.

(d) 1 Rose, 94.

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—
Ex parte
ROBINSON.

The merits were accordingly gone into, and it appeared that there were partnership debts which were still outstanding.

ERSKINE, C. J.—Although the petitioner attempts to make out that the debt he now claims is of a private nature, as the balance of accounts between him and the bankrupt, and that the ground of its rejection was, that such balance was not ascertained between him and his late partner; yet, as it appears from an entry on the proceedings by Mr. Commissioner *Holroyd*, that there are still debts due from the partnership yet unpaid, and that such was the reason why the proof was rejected, the petitioner is not in a situation to prove against the bankrupt. Not being in a situation to prove, it is equally clear he cannot petition to stay the certificate. The mere subsistence of accounts, the balance of which was unascertained, would be no objection to the admission of the proof (a). But on this petition and the affidavits, it is impossible I should interfere.

The petition was dismissed with costs, to be paid to the bankrupt, and the certificate to go.

^a (a) See *Ex parte Johnson*, 1 Atk. 81; *Ex parte Hadley*, 1 G. & J. 193.



1834.

Ex parte HUNT.—In the matter of Fox.

MR. J. P. COBBETT applied that a warrant of commitment might issue for disobedience of a four-day order, made for the payment of costs.

November 3.

Application for warrant of commitment for disobedience of a four-day order is *ex parte*, and quite of course.

The Court made the order, observing that it was *ex parte*, and quite of course. The order now asked had been applied for in the long vacation, but as other Courts were not in the habit of issuing attachments during that period, the order had been, on that account, then refused. But if there had been any case made out of intention to abscond, that would have justified the Court in making the present order when it was originally asked for.

Court will not issue attachment in the long vacation, unless there is fear of the party's absconding.

Ex parte BIRKETT.—In the matter of Fox.**Ex parte Fox.**—In the matter of Fox.

MR. SWANSTON applied for a similar order. The costs due had been taxed, and the four-day order for their payment had been disobeyed.

November 3 & 4.

Order of commitment for disobedience to order to pay into Court, will not be stayed, under any circumstances, unless party has paid the money in, or is ready to do so.

Mr. Twiss, on the second petition on behalf of the bankrupt, applied that the order might be stayed, and that, according to the prayer of the second petition, the costs might be re-taxed.

ERSKINE, C. J.—I understand that the costs have not been paid into Court. That not having been done, and the bankrupt not being now prepared to do so, it

1834.

Ex parte
BIRKETT.
Ex parte
Fox.

is impossible that his application to stay the order, now asked for by Mr. *Swanston*, should be granted.

The attachment was accordingly issued.

November 4.

Omission of year in date to signature of certificate by creditor, where the date was properly attached to preceding signature, rectified.

Officer ordered to pass such certificates in future without putting parties to expense of petition.

In the matter of BUCKLEY and TRUEMAN.

MR. *MONTAGU* applied that the certificate might pass. It had been objected by the office, that the year 1834 was not attached to the date of the signature of one of the creditors, but the year (1834) was attached to the signature immediately preceding it; and it was therefore, at least, improbable that the signature could have been made at an earlier period.

The COURT ordered the certificate to pass; intimating to the Registrar, that, in similar cases, the certificate might be received, without putting the parties to the expense of any application to the Court for that purpose.

Ex parte STORY.—In the matter of JOHNSON.

Same day.

Petition in paper of day. Motion made, on notice, that it might stand over to amend, by adding a party respondent. Party moving must pay costs of all parties served with notice; but petition not being called on, without costs of the day.

MR. *GREENE* applied that this petition, which stood in the day's paper, might stand over, for the purposes of amendment, by adding another assignee as a party to it, he having been previously supposed to be dead.

Assignees, on the representation of the solicitor to the commission that he is authorized to receive it as agent, pay over a dividend to such solicitor. It turns out he had no such authority. Upon petition of creditor for payment to him of the dividend, charging that no authority was given to that solicitor, held, that being solicitor to the commission he might be made respondent as well as the assignees, and that a joint order might be made against them all for its payment.

On dividend being withheld, assignees ordered to pay it, with five per cent. interest from time of application to them for payment.

Mr. *Swanston* and Mr. *R. Parker* appeared for two separate respondents.

1834.

Ex parte
STORY.

ERSKINE, C. J.—You must pay the costs of all parties appearing on this application.

Mr. *Greene* referred to *Ex parte Green re Ridley (a)*, in which it was held, that where notice was given to the respondent of a motion for leave to amend a petition, and such permission was given after the respondent appeared to oppose it, the respondent was not to be allowed the costs of the day.

ERSKINE, C. J.—There the only amendment required was, by adding a prayer for costs; and the petition might have been amended without its standing over; so that the costs of the opposition were unnecessarily incurred. Here the required amendment goes materially to alter the rights of the parties to the petition, and I think that the costs of all parties served with the notice of motion, must be paid to them, in consequence of its standing over.

Mr. *Swanston* then applied for the costs of the motion also.

ERSKINE, C. J.—You cannot have both, the petition was not called on.

The Order for amendment was made, the petitioner paying the costs of all parties served with notice of the motion. The petitioner to amend the petition and the copies served; but no costs of the day.

1834.

Ex parte
STORY.
December 10.

The petition now came on to be heard.

Mr. *Greene*, for the petitioner, stated the facts on the petition to be, that in February last *Jaques* presented a petition to this Court, stating that *Johnson* the bankrupt, by bond dated November 1824, became bound to *Jaques* in 398*l.* for payment of 199*l.* 3*s.*, and interest, to *Jaques* and his wife, and that the commission issued in December 1824, and, under it, *Wilcoxon* and *Waugh* were chosen assignees, and employed * * *, a solicitor of this Court, as solicitor to the commission. *Jaques* proved his debt of 199*l.* 3*s.* with interest, and a dividend of 2*s.* 9*d.* was declared, amounting to 16*l.* 17*s.*, but which was erroneously calculated on a sum less than was actually due on the bond, and less than was proved; and further stating, that *Waugh* and *Jaques's* wife were dead, and that *Wilcoxon* refused to pay the dividend to *Jaques*, alleging that he had paid it to the solicitor on account of *Jaques*; but that *Jaques*, by his petition, denied having in any manner authorized the solicitor to receive the same, and that neither the assignees nor the solicitor had ever accounted to *Jaques* for the same; and his petition prayed, that the solicitor might pay over to *Jaques* all money placed in his hands for payment of *Jaques's* dividend, and that *Wilcoxon* might pay over the residue with interest. Before that petition was heard *Jaques* died, and the present petitioner, *Story*, was appointed his executor. The petitioner had lately discovered that *Waugh* was still living.

The petition prayed the same relief against the solicitor and *Wilcoxon* and *Waugh*, as was sought to be obtained by *Jaques's* original petition.

ERSKINE, C. J.—Is not the whole question, whether the attorney received the money on account and by the authority of *Jaques*? or whether he was not the agent for *Jaques*, appointed and authorized to receive the dividends?

1834.

Ex parte
STORY.

Mr. *Greene*. Our charge is, that he was not *Jaques*'s agent, and we seek to recover the amount of the dividends from the assignees.

The COURT, considering that a *primâ facie* case was established against the assignees, called upon the respondents to rebut it.

Mr. *Bacon*, for one of the assignees, *Wilcoxon*, contended that the agency was established by the affidavits, and therefore that the assignees were discharged.

Mr. *Keene*, for the other assignee, *Waugh*, stated that he had been declared a bankrupt in 1825, and had never received or paid any thing, or acted in any way in the office of assignee; and therefore claimed to have the petition, as against him, dismissed with costs.

Mr. *Swanston*, for the solicitor. The case made by the petitioner is, that *Jaques* never authorized the solicitor to receive this dividend. How, therefore, can he be justified in filing this petition as against him? There is no privity between them; and though the assignees may have a claim against the solicitor for the money, it is manifest that the petitioner has none, and the petition must be dismissed as to him. If he had asserted that the solicitor received the money as *Jaques*'s agent, the petitioner's proper remedy would have been by action, and not by petition to this Court;

1834.

Ex parte
Storv.

so that in neither way of looking at it is the petition maintainable.

Mr. *Greene*, in reply. The assignees and the solicitor dispute, as between themselves, the right of this petitioner. The former say that we must look to the solicitor, as he was *Jaques's* agent; and the solicitor says, that he is only responsible to the assignees, having been their agent and not our's. Both parties are, however, officers of the Court, and as such liable to be called upon to distribute, in the due course of administration, the funds of their bankrupt, which have come to their hands. The bankrupt, *Waugh*, says, that at all events he is not responsible, since he has had no hand in the transaction. But that argument is at once met by the decision of this Court in *Ex parte Winnall*(a). It was there held, that where one assignee, having the sole charge of paying the dividends, paid the dividend to a third party, who was not duly authorized to receive it, the co-assignees were equally responsible for the amount to the creditor.

ERSKINE, C. J.—This application must be granted against all the respondents. No case of the agency of the solicitor, or of any authority to him to receive the dividends, has been made out. It is said, that the solicitor claimed from the assignees to be paid the dividends as the agent of *Jaques*, but the solicitor has not proved before the Court that he was agent, or had any authority to receive this money. Thence no doubt can arise to the claim of the petitioner against the assignees. They are, at all events, still responsible to

(a) 3 Dea. & Chit. 22.

him. But the solicitor is also liable to be called on to repay this money, and upon the present petition ; not indeed on the ground of his being an agent, but, being the solicitor to the commission, and, as such, the special officer of this Court, he is therefore liable to be called on to account for the money which he retains from the assignees. The order must, therefore, be joint, and the petitioner has his remedy against either the solicitor or the assignees for the payment.

1834.

Ex parte
STORY.

Sir J. CROSS.—I think it may be taken as indisputable, that the solicitor never had any authority from *Jagues* to receive the dividends ; and had he not been solicitor to the commission, there might have been great difficulty in rendering him amenable to this Court for the repayment of them. But, as it is, I entirely concur with his Honor the Chief Judge, that the prayer of this petition must be granted.

Sir G. ROSE.—The petitioner is entitled to the order which he prays ; and I cannot help observing, that the assignees ought to feel much indebted to the petitioner for the manner in which he has brought forward his case. Had not the agency of the solicitor been denied by the petition, considerable difficulty might have existed ; but, being denied, the assignees might have been called on alone to repay this money ; and they would have been put to the trouble and expense of afterwards bringing forward their claim against the solicitor. They are therefore much benefited by the petitioner having joined the solicitor with them as respondents. If the solicitor had admitted the existence of agency, there would have been an obstacle in the

1884.

Ex parte
STORY.

way of our exercising any jurisdiction against him by an adverse order. But he denies the agency, and says that he has the money as part of the assets of the bankrupt's estate; and this is a sufficient justification for his being brought here. The terms of the order will provide against any circuitry of remedy over against the solicitor.

The petitioner will be entitled to the principal and interest at five per cent. from the time of his application to the assignees for payment.

The ORDER made was, that the petitioner is entitled to be paid his dividend, with interest at five per cent., from the time of his demand, of which time let there be an affidavit. Let the solicitor pay the dividend received by him, with interest, at the like rate, from the time he received the same. Let the petitioner make his claim against the solicitor in the first instance, and restrain the petitioner from proceeding against the assignee, *Wilcoxon*, until he has done so. The petitioner's costs of this application to be paid by *Wilcoxon* and the solicitor. No costs to the other assignee, and no order against him.



Ex parte JOHN ANNANDALE, JOHN BARBER, and
JOSEPH COLLINSON, creditors' assignees, and JAMES
CLARKE, official assignee.—In the matter of THOMAS
CURTIS.

1834.

November 4.

THE petition stated that the fiat issued on the 21st
January 1834, at the instance of *Thomas Neale*, who,
claiming to be a creditor, was examined to ascertain the
amount of his claim, and upon that occasion stated his
claim to consist of the following items:—

	£	s.	d.	
Ten shares in the Eagle office	46	5	0	to do something
Annuity redeemed	300	0	0	better for you,
Half a year's interest on the same	7	10	0	to allow my
Interest on 46l 5s. to Christmas 1829	1	9	0	daughter 100l.
Ditto on 307l. 10s.	7	7	6	a-year, which
	£362	11	6	you can have as
One year's annuity due to me from Mr. Curtis	100	0	0	you may re-
One year's interest on 362l. 11s. 6d.	18	2	6	quire." Held
January 27th, 1832, ditto	19	0	8	to be an an-
One year's annuity	100	0	0	nuity during the
January 27th, 1833, one year's annuity	100	0	0	joint lives of
Interest	19	19	8	the father and
January 27th, 1834, interest	20	19	8	daughter; and
One year's annuity	100	0	0	though inca-
	478	2	6	pable of valua-
To which I add the foregoing amount of	362	11	6	tion, and though
	840	14	0	no other evi-
Deduct from that, December 30th, cash	135	0	0	dence of the
Sundries	1	19	0	genuineness of
1833, January 17th, cash	180	0	0	the letter, held
August 16th, ditto	20	0	0	to be provable.
November 6th, bill (unpaid)	9	13	6	Sir J. Cross dis-
Ditto	10	0	0	sent., upon the
November 28th, cash	56	0	0	ground that the
..... bill	50	0	0	facts required
December 11th, bill (not due)	22	0	0	further investi-
	484	12	6	gation.
	356	1	6	

1834.
 —
 Ex parte
 ANNANDALE
 and others.

The balance of 356*l.* 1*s.* 6*d.* is the amount of the debt proved against this estate, and I also claim to prove for the value of the annuity of 100*l.* a-year, secured to me by the letter, of which the following is a copy :—

“ Budge Row, 23d December, 1829.

“ My dear Sir,—The subject we were conversing on this morning has occupied my most serious consideration, as I informed you it is not convenient to me to give you a sum of money at this present time ; but as you are desirous of settling, I promise you, until it is convenient to me to do something better for you, to allow my daughter 100*l.* a-year, which you can have as you may require, and I think this will be equally advantageous to you. The amount of the annuity, left to *Jane* by her late kind friend, I have, and will in some way dispose of to your mutual benefit.

“ I shall feel great pleasure in assisting you all in my power in the furnishing your house, and I will consult with you as to what you may require. With sincerest wish for your mutual happiness, I am, &c.

“ *Thomas Curtis,*

“ Mr. *Thomas Neale*, 129, Shoreditch.”

That on the same occasion *Neale* stated the ten shares in the Eagle Office to have been the property of Miss *Curtis* (the said bankrupt's daughter) before her marriage with *Neale*. That it was not proved that the ten shares ever belonged to her, but, on the contrary, they were the property of a Mr. *Hovatt*, and that the same were transferred to the bankrupt, who sold them several years since and applied the money arising from the purchase, amounting to 46*l.* 5*s.* to his

own use. That no money was ever paid on account of or in respect of the annuity purporting to be secured by the above letter of December 1829, otherwise than as appears by the before-stated accounts, nor did it appear that *Neale* had taken any account of the annuity otherwise than by making an entry thereof in his pocket-book. That *Neale* till very recently kept a corn-chandler's shop in the neighbourhood of Shore-ditch, after which he went to reside at Higham Hill. That the bankrupt possessed some leasehold property, which he pretended had also been settled or secured to his daughter as or by way of marriage portion; but that, being threatened to be examined, his solicitor attended before the Commissioner, and confessed that such leasehold property had been fraudulently conveyed by the bankrupt to his brother *Robert Curtis* about the 28th February 1829, and that the property remained standing in his name until about the bankruptcy, (the bankrupt continuing to receive the rents himself,) and that *Robert Curtis*, about the 24th January 1834, (being three days after issuing the fiat,) conveyed the same to *Neale*. That the conveyance by the bankrupt to his brother purported to be made in consideration of 300*l.* and though the consideration money apparently passed to the bankrupt from his brother at the time of the conveyance, yet such money was actually the money of the bankrupt, and furnished by the bankrupt for the purpose of giving credit to the transaction; and that notwithstanding such conveyance the bankrupt continued to receive the rents until the bankruptcy, after which *Neale* entered into the receipt of them. That on *Robert Curtis* conveying the premises to *Neale* he received 120*l.* as the consideration,

1834.

Ex parte
ANNANDALE
and others.

1834.

Ex parte
ANNANDALE
and others.

and that the money he so received he immediately after returned to *Neale*. That *Neale*, by his solicitor Mr. *Callon*, has paid over to the official assignee 19*l.* 8*s.* 6*d.*, the amount of the rent he so received, and gave up the premises to the assignees without any consideration for so doing. That *Neale*, while he kept a shop, had been in the habit of accepting bills for the bankrupt, who furnished the means from time to time for taking them up. That it was urged before the Commissioner, that there was no proof of the letter of December 1829 having been written at the time it purports to bear date; that no sum of money was ever paid upon the annuity; that the transactions between the bankrupt and *Neale* were of such a nature as to throw suspicion on the claim so made, and that under the circumstances the evidence of the bankrupt and *Neale* only ought not to be received as sufficient evidence that such letter was written at the time it purports to bear date; and that it was not an annuity which could be of any value, or upon which the Commissioner could set a value, even if he should be of opinion that the letter was written with a *bonâ fide* intention to make a provision for his (the bankrupt's) daughter. That the Commissioner admitted *Neale* to prove for 1418*l.* 11*s.* 6*d.*, being the sum of 356*l.* 1*s.* 6*d.*, the amount of the account before-mentioned, and the sum of 1062*l.* 10*s.*, as the value of the annuity, admitting the annuity on the valuation of an actuary upon the bankrupt's age of fifty-seven years; but at the same time the Commissioner stated he thought that, on account of its importance, the assignees would be justified in taking the opinion of this Court, but felt himself bound by the current of autho-

rity to admit the proof, and a dividend was thereupon declared, reserving that upon the debt so proved by *Neale*, to give the assignees the opportunity of presenting a petition.

The petition prayed that it might be declared that *Neale* was not entitled to prove against the bankrupt's estate for the sum of 46*l.* 5*s.*, the value of the ten shares, or for the several sums of 100*l.* for the four annual amounts of the annuity, or for the sum of 1062*l.* 10*s.*, the alleged value of the annuity; and that *Neale's* proof might be expunged and reduced accordingly.

The assignees did not, at the hearing, adduce any evidence to substantiate the charge of fraud, other than that mentioned in the petition.

Mr. *Bethell*, for the assignees. It was never contemplated by the legislature that an annuity, constituted by such a document as the present, should be allowed to be proved. The consideration of the annuity is marriage, which therefore cannot be valued. The words of the 6 *Geo.* 4. c. 16. s. 54. are, "any annuity creditor of any bankrupt creditor, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity, shall be entitled to prove for the value of such annuity, which value the Commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission." But if there is no price which is capable of valuation given for the annuity, as in this case, the annuity cannot be proved. In *Ex*

1834.

Ex parte
ANNANDALE
and others.

1834.

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ANNANDALE
and others.

parts Saxe (a), the bond was forfeited, which did away with the difficulty that exists in this case; so that there the debt could be proved either under the statute or independent of it. The vague manner in which the letter is penned creates also another difficulty. There is no period mentioned for which the annuity is to be payable. It does not state whether the 100*l.* a-year is to be paid for the life of the grantor, or the daughter or the husband. It is so indefinite that a Court of Equity could not, independent of bankruptcy, decree a specific performance, and therefore it is impossible to fix any value upon it within the words of the act.

The circumstances stated in the petition give rise also to so much suspicion, that the Court ought not to allow this proof to stand.

Mr. *Swanston*, and Mr. *Montagu*, for the respondent, cited the case of *Ex parte Sitger (b)*, where an annuity given in almost precisely similar words was held provable. In *Ex parte Saxe*, though there was no consideration passing capable of being valued, the proof was admitted.

ERSKINE, C. J.—The petition seeks to expunge this proof upon two grounds. First, it is said that the letter is not genuine, but was written after the bankruptcy; and, second, it is contended that, if genuine, no proof ought to have been omitted, because such an annuity is incapable of valuation. As to the first objection, I confess I see no ground to regard the letter

(a) 2 Dea. & Ch. 172; S. C. Mont. & Bli. 134.

(b) Mont. 100.

otherwise than genuine, or to doubt that it was written and delivered at the time it bears date. As to the second objection, the letter which constitutes the title to this annuity is certainly very ambiguous. It would readily bear a different construction from that which the learned Commissioner has adopted. It might be construed that the annuity was to be paid during the life of the daughter, or during the joint lives of her and the bankrupt; which latter interpretation I feel much inclined to adopt; and if it would make any difference in the valuation, I think the assignees ought to have the benefit of it. But I am far from agreeing that there is any ground for rejecting the proof. Because there is no consideration capable of valuation, is no reason why the Commissioner may not value the annuity. The 54th section says, that the proof of annuities shall be admitted, and then goes on to say that they shall be valued, "regard being had to the price originally paid for them." But if no such price has been paid, the act does not go on to say that they shall not be proved, and does not exclude annuities, the considerations of which are incapable of valuation. This part of the case we have already decided in *Ex parte Saxe* (a). There the consideration, being the giving up of a good-will in business, was incapable of being valued, and yet we held that the proof should be admitted. I therefore think the annuitant is entitled to retain his proof to the value, found by an actuary, of an annuity of 100*l.* per annum, payable during the joint lives of the father and daughter.

1834.

Ex parte
ANNANDALE
and others.

Sir JOHN CROSS.—The only difficulty I have is upon

(a) *Supra.*

1834.

Ex parte
ANNANDALE
and others.

the facts. So much fraud seems to have existed, that I can hardly be persuaded to declare this transaction *bonâ fide*. I think there ought to be some further inquiry.

But Sir G. ROSE concurring with the Chief Judge,

The Petition was dismissed.—The costs of all parties to be paid out of the estate.

Ex parte BLANDY.—In the matter of FOSTER.

Nov. 5.

Service of order on assignee to elect to take or reject an agreement, substituted on affidavit, of his purposely keeping out of the way. *Semble*, that service, substituted by order, is tantamount to personal service, *eo nomine*.

MR. SWANSTON applied for leave to substitute service of an order (which had been obtained upon a petition, calling on an assignee to elect whether he would take to or repudiate an agreement entered into by the Bankrupt, under the 6 G. 4. c. 16. s. 75.) upon the assignee, who was keeping out of the way to avoid service.

ERSKINE, C. J.—I believe there are many authorities in bankruptcy, though not at law.

Mr. Swanston referred to *Ex parte Anderson* (a), and *Anonymous* (b).

ERSKINE, C. J.—The form of the old order is to elect “within fourteen days after *personal service* :” ought you not, therefore, to apply for a new order, altering those words?

(a) Buck, 38.

(b) 4 Mad. 462.

Mr. *Swanston*. When service is substituted under an order of the Court for that purpose, it is considered as *personal* service; *Ex parte Bowler* (a); and even in the case of an injunction, substituted service has been ordered to be good, *Pearce v. Crutchfield* (b).

1884.

Ex parte
BLANDY.

ERSKINE, C. J.—Your affidavit in support of this motion does not state that the assignee is wilfully keeping out of the way. But let the order pass, on producing a proper affidavit to that effect.

Ex parte TOWNE.—In the matter of BROWN.

THIS was an application, by the solicitor to the fiat, for leave to bid at the sale of the bankrupt's property. The petition was served upon the assignees, and they did not appear to offer any opposition to it.

Nov. 6.
Court will not, except under very peculiar circumstances, give leave to solicitor to fiat to bid at sale.

Mr. *J. P. Cobbett* for the petitioner.

The COURT, however, refused to make the order, and observed, that they should always be reluctant to do so, unless very peculiar benefits were shown as likely to arise to the estate by granting the application. No such benefits were contemplated in the present instance. The temptation which would be afforded to the solicitor to undervalue the property, would, in general, be too great to sanction his having the power to bid (c).

(a) Buck, 258.

(b) 14 Ves. 206.

(c) See *Ex parte Farley, re Delves*, 3 Dea. & Ch. 110.

1834.

Ex parte COLLIER.—In the matter of *COWELL*.

Nov. 6.

Under the 6 G. 4. c. 16. s. 48. it is not requisite to prove a hiring for a year certain, but it must be something more than a mere hiring by the week.

Ex parte Skinner, Mont. & Bli. 417, corrected.

THIS petition was presented under the 6 G. 4. c. 16. s. 48. for the payment in full to the petitioner of the amount of his wages for six months, and for liberty to prove for the residue. The original hiring (the employment being that of an overlooker or manager in a cotton mill) was at 33*s.* per week, but subsequently the hiring became by contract for 104*l.* per annum, payable weekly. The Commissioner had rejected the claim.

Mr. Anderdon, for the petitioner.

Mr. Swanston, *contra*, cited *Ex parte Skinner* (a), where it appears to have been held that the proviso in the 48th section extended only to yearly servants.

ERSKINE, C. J.—That decision is certainly wrongly reported. I remember the case well, and yet have no remembrance of either of us using the expressions attributed to the Court. All that was intimated amounted to this, namely, that some longer period of service than that of a mere weekly hiring was contemplated by the legislature (b).

Sir J. Cross.—A yearly hiring has often been al-
luded to in this kind of case, not as being absolutely necessary to bring a party within the benefit of the proviso, but as showing that the service required must be

(a) Mont. & Bli. 417; but see the report of this decision, 3 Dea. & Ch. 392.

(b) See the report, 3 Dea. & Ch. 333.

of some permanency, something more than weekly. In the present case, I think, the Commissioner is in error, because there is the strongest testimony that the service is of more extended duration than a weekly one. It is, in fact, contracted that it shall be at a yearly salary, though payable weekly. The Courts have excluded mere weekly tenants from the benefit of this provision, taking it as granted that the legislature never contemplated them, owing to the mischiefs which would arise if they were let in. For in many large commercial or manufacturing establishments the mere weekly amount of wages is often enormous; and if such servants who ought to be paid, for their own sakes, the moment their wages become due, namely, at the end of the week, were allowed to suffer them to run in arrears with impunity, the whole of the bankrupt's estate might be swallowed up without the other creditors touching one penny of it.

1834.

Ex parte
COLLIER.

Sir G. ROSE.—No such general rule as that contended for by Mr. *Swanston* has ever been laid down. All that is decided is, that the hiring must be of longer than a week's duration.

The petition was granted, with costs, out of the estate.

Ex parte DUGARD.—In the matter of AUGHTIE.

A Proof of a debt by the brother of the bankrupt having been admitted, and some circumstances of sus-

Nov. 5 & 6.

dered in any stage of proceedings. If affidavits have been filed on both sides, (in the absence of consent,) the Court will first hear the affidavits read, and then, if it thinks fit, will order a *viâ voce* examination. If one party has not relied on affidavits, he, on a proper case made by motion and affidavit, may obtain such examination.

Viâ voce examination ordered under circumstances of this case.

On consent of all parties a *viâ voce* examination will be or-

1834.

Ex parte
DUNCAN.
Nov. 5.

picion arising as to its being *bonâ fide* due, this was a petition to expunge the proof; and on this day

Mr. *Twiss*, and Mr. *Bacon*, on behalf of the petitioner, moved for a *vivâ voce* examination.

Mr. *Swanston*, and Mr. *Montagu*, opposed the application.

ERSKINE, C. J.—The rule as to *vivâ voce* examinations may be thus stated: Where the petitioner and the respondent acquiesce in the application, then in any stage of the petition it will be granted as a matter of course. If one party, however, opposes it, then the expense to be incurred will induce the Court to pause. If affidavits, as in this case, have been filed on both sides, the Court will first hear the case on those affidavits, and if, after that, they see reasonable grounds for further evidence, will then order a *vivâ voce* examination. If one party, not having relied on any affidavits filed, comes to the Court on a preliminary motion, and makes out a case by affidavit, showing such an examination to be requisite to the ends of justice, it may be granted.

Nov. 6.

The petition stood on the paper for this day, and on its being called on,

Mr. *Twiss*, and Mr. *Bacon*, stated that the Commissioner had so much doubted the validity of this debt, that, though he admitted it, he made the party applying to prove pay all the costs. Justice could not be done if this case were heard on the mere inferior evidence of affidavits.

Mr. *Swanston*, and Mr. *Montagu*, still insisted on the general rule being followed.

1834.

Ex parte
Dye and,

Sir J. Cross.—The Commissioner himself expresses the difficulty he had in arriving at the truth in this case. He had the parties, nevertheless, before him, and examined them in the manner it is now proposed we should do, and yet a doubt remained in his mind. I cannot think we shall execute justice between the parties upon mere affidavits, or if we are satisfied with any thing less than the best evidence that can be afforded to us. I therefore feel we are bound to order a *viâ voce* examination.

Mr. *Twiss*, and Mr. *Bacon*, proceeded to state, that from the proceedings it appeared that when the party was examined before the Commissioner as to how he made out his claim against the estate, he stated that it consisted of different sums of money lent to the bankrupt, and he was asked from whence he himself derived funds for that purpose; to which he replied, from money borrowed from other people, and from the profits of his own business. With this the Commissioner was not satisfied, and he adjourned his examination to give the party an opportunity of adducing evidence of those facts. When he was again examined, instead of bringing forward any such evidence, he made out quite a different case, and proceeded to show that his funds were produced from other different sources,—a circumstance quite sufficient to throw great doubt over the *bona fides* of the transaction.

The Court thought this established the expediency of an examination *viâ voce*, and it was ordered accordingly.

1835.

Ex parte
DUGARD.

July 19.

Semble, that a petitioner, who is also assignee, and is proposed to be examined as a witness by the respondents, is excepted from the general rule for excluding witnesses during *voir dire* examination.

In the same matter.

THE examination ordered on a former day was proceeding, and witnesses had been ordered to withdraw from the Court. But the petitioner, who was also the assignee, remained, to which

Mr. *Swanston* and Mr. *Montagu* objected.

Mr. *Twiss* and Mr. *Bacon* contended, that being the petitioner he had a right to remain just as much as though he were conducting his own case. Parties in the cause should, in general cases, form an exception to the general rule. Here, too, very little can turn on his evidence, though he will be examined; while the whole will turn on the evidence of the respondent. So that there is greater reason for excluding the latter from the Court while the examination of other parties goes on.

ERSKINE, C. J.—Without laying any general rule, I think the petitioner ought to be allowed to remain. He is not proposed to be examined by his own counsel in support of his petition, but by the other side, which makes some difference; and being both petitioner and assignee, I think he must be considered in the light of a solicitor in the cause, and that his presence may be absolutely necessary for the proper conduct of the case.

Sir J. CROSS and Sir G. ROSE concurred.

1834.

Ex parte REAY and others.—In the matter of THOMAS
CHAMPION.

THIS petition stated, that previous to the 22d December 1831, *Champion* owed the petitioners 6000*l.* as the drawer of seven several bills of exchange upon *John Leech*, and the further sum of 1000*l.* as the acceptor of two several bills of exchange for 500*l.* each, drawn by *Leech*. These bills were delivered (indorsed and accepted by *Champion*) to the petitioners by *Leech*, for valuable consideration. On the 22d of December 1831, a fiat issued against *Leech*, and the petitioners proved the whole of the several bills under it. In August 1833, *Champion* stated to the petitioners that he was unable to pay the 7000*l.* in full, and proposed to them to accept as a composition thereon 1750*l.*, and the assignment of a bond, dated the 23d August 1831, for 3000*l.*, executed by *Charles Dennis*, and by him and *Leech* assigned to *Champion*; and that the payment of the 1750*l.* should be in the following manner: The immediate payment of 250*l.* in cash or approved bills, and the residue of the 1750*l.* as follows:—500*l.* by a bill of exchange dated the 1st day of May 1833, drawn by *Champion* upon, and accepted by, *James Crawshaw*, payable eighteen months after date, and the residue by five several bills of exchange dated the 29th August 1833, payable at different dates, one for the sum of 250*l.* payable on the 4th March 1834, and the others for 187*l.* 10*s.* each, payable at 14 months, at 20 months, 26 months, and 30 months, respectively, from the date. The petitioners consented to the pro-

November 6.
Creditor having agreed to accept a composition for his debt, takes bills for the amount of the composition, and also has a bond assigned to him as part security for the composition. The composition deed contained a clause that in default in payment of instalments, the composition should fall to the ground. Default is made, and subsequently a fiat issues. *Held*, that creditor might prove balance of original debt remaining due, and also retain the bond.

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Ex parte
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posal; and the deed of composition, amongst other things, contained the following covenants and conditions:—
“ That for the considerations therein stated the petitioners thereby covenanted with *Champion*, his executors, &c. that when the bill of exchange for the last instalment of the 1750*l.* should be duly paid, according to the true intent and meaning of the deed, the bills for all previous instalments having in like manner been duly paid, the petitioners would, on demand made, by and at the costs and charges of *Champion*, his executors, &c., execute and deliver a good and sufficient release in the law to *Champion* from the nine several bills of exchange to the amount to 7000*l.*, and all interest due thereon, and all claims and demands to the petitioners against *Champion* in respect of the same; and that in the meantime that the petitioners would not arrest, sue or molest, nor issue any fiat in bankruptcy against *Champion*, or take any proceeding whatever at law or in equity against him, his estate and effects, on account of the nine several bills; and also that from and after full payment of the six bills which had been so given as aforesaid for payment of the 1500*l.*, residue of the said composition, as and when the said six bills of exchange should respectively become due and be payable, the nine bills of exchange should, as against *Champion*, his heirs, executors, &c., become absolutely void. Provided always, that in case such default shall be made in payment of the bill for 500*l.* when it should become due and payable, or in case *Champion* should make default in payment of any or either of the other instalments of the before-mentioned composition, or any fiat in bankruptcy should issue against him, either alone or jointly with any other person, previous to the pay-

ment of the whole of the instalments, then and in either of such cases and thenceforth the deed should cease, determine and be utterly void to all intents and purposes, and the said nine several bills should be in full force to the extent of the amount then due thereon, after giving credit for any instalment of the composition that the petitioner might have received, in like manner as in case the deed had not been made." The petition further stated, that the bond and the bills were duly delivered to the petitioners, and 250*l.* was immediately paid to them. The first bill, namely, for the sum of 250*l.*, which became due on the 24th day of March 1834, was dishonoured. The only payment which has been made thereon was 178*l.* 3*s.* 2*d.* on account. The petitioners proceeded at law against *Champion*, and on the 14th day of May last arrested him for 71*l.* 15*s.* 10*d.* On the 27th May 1834, a fiat issued against *Champion*. The petitioners received from the estate of *Leach*, upon the proof for 7000*l.*, dividends to the amount of 1020*l.* 16*s.* 8*d.* The petitioners had also received from *Champion* 178*l.* 3*s.* 2*d.*, and after giving credit for such sums, and 250*l.* so paid by *Champion*, and the said acceptance of *Crawshaw* for 500*l.*, and one bill for 187*l.* 10*s.*, and balancing the interest account, 3159*l.* 10*s.* 6*d.* was due to the petitioners from *Champion* at the date of the fiat. Proof was tendered for 1345*l.* 10*s.* 11*d.*, being by mistake 13*l.* 19*s.* 7*d.* less than the sum which they were entitled to prove. But the Commissioner rejected such proof, on the ground that a debt could not be proved unless the bond for 300*l.* was given up, as the deed was good as to the whole or void as to the whole.

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Ex parte
REAY
and others.

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Ex parte
REAY
 and others.

The petitioner therefore prayed liberty to prove, and for the stay of the certificate in the meantime.

Mr. *Montagu*, and Mr. *Bethell*, in support of the petition, cited *Ex parte Vere* (a), *Ex parte Richardson* (b), *Ex parte Peele* (c).

Mr. *Saltau* appeared for the bankrupt.

Mr. *Swanston*, and Mr. *Bacon*, for the assignees. The petitioner can have no right to prove in this case without giving up the bond. This is an extraordinary case, and the first of the sort. The bond was never given as, or intended to be, a security for the original debt, but merely as a security for the composition. If, then, the petitioner claims to be remitted to his original debt, on the ground that the composition is at an end, the bond must be given up, as he has no longer any right to its retention.

ERSKINE, C. J.—A creditor having a security from the bankrupt for payment of his debt, may do one, but only one, of two things. He may prove for his entire debt, if he surrenders in his security; or he may retain the security, and prove for his original debt, minus the value which shall be set upon the security; *Ex parte Ackroyd* (d). In this case the petitioner elects to adopt the latter course, and is, therefore, entitled to prove. It is equally clear, that the petitioner in this case is not confined to the amount of the composition.

(a) 1 Rose, 281; S. C. 19 Ves. 93.

(b) 14 Ves. 184.

(c) 1 Rose, 435.

(d) 1 G. & J. 393, 394.

The terms of the composition being broken, the petitioner is entitled to be remitted to his original position, and may, therefore, prove for the entire original debt, subject to deductions in respect of monies which he has received, and the value of the security.

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REAY
and others.

Sir J. CROSS concurred.

Sir G. ROSE.—The petitioner's rights in this case are precisely as intimated by his Honor the Chief Judge. But were it otherwise, the circumstance that there may be a question to be litigated between the assignees and the creditor as to his right to retain the bond, or to retain even money which has been paid to him by the bankrupt under the composition, affords no sufficient ground to resist his proof. The sum which he claims to prove is clearly due to him, and any question now raised against the proof is amply to be provided for, by the mode of payment of dividends. This is the principle in *Ex parte Ackroyd (a)*, which decides that the proof of a debt, which must at all events be due, is not to be rejected, because there is a question to be tried between the bankrupt's estate and the creditors as to the right to retain a payment made on the eve of bankruptcy; although it is proper that no dividend should be paid on the proof, until the question be determined. I do not, however, think there is any ground for the litigating any question as to the creditors' right to retain this bond. Like a bill of exchange, by an equitable assignment, this bond passes the value of it as money. If money, instead of the bond, had been paid, the petitioner would have had an indisputable right to retain it. And taking this security as money, the same rights will attach.

(a) 1 Gl. & J. 391,

1834. The petitioner has, therefore, in our opinion, a right to retain his security, and to prove for the sum actually due to him, minus the value of the security.

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REAY
and others.

Petition granted, with costs out of the estate.

Ex parte HUTCHINSON.—In the matter of FREEMAN.

November 12.
Solicitor's bill
taxed, and paid
six years back,
will not be or-
dered to be re-
taxed, without
special reasons.

THIS was a petition seeking the re-taxation of three bills, which had been taxed and paid to the solicitor six years back.

Mr. Bacon, for the petitioner.

Mr. Swanston, for the respondent, resisted the application, on the ground of the length of time, and because there were no special grounds for opening the settlement of the account.

The Court, for these reasons, dismissed the petition with costs.

Ex parte THOMAS HALL.—In the matter of JOHN HALL, JOSEPH HALL, and THOMAS HALL.

May 7.

Though the assignees, with the concurrence of the commissioners, have ordered an allowance for maintenance, (under 6 G. 4. c. 16. s. 114.)

till the bankrupt has passed his last examination, which order remains on the proceedings, yet if the assignees afterwards withhold the maintenance, on the ground of the final examination being adjourned *sine die*, the Court has no power to interfere, either as to the maintenance or the passing of the examination.

THIS was a petition by the bankrupt, praying the continuance of his allowance for maintenance, and also for the arrears, and that the Commissioners might be directed to pass his last examination. The petition stated the fiat to have issued in June 1832, and *Wedgwood*

and *Heath* were chosen assignees. At a meeting 28th August 1832, an order was made by the Commissioners, under the direction, and at the request and recommendation of the assignees, for payment of 2*l.* per week out of the estate to the petitioner, *Thomas Hall*, for the support of himself and his family, until the petitioner should pass his final examination.

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Ex parte
HALL.

The final examination of the petitioner had been postponed by the Commissioners from time to time, in order to allow sufficient time for the accounts and books of the bankrupts to be made up, and on the 14th February 1833, the petitioner attended a meeting, to pass his final examination and produce his balance-sheet; but they were rejected by the Commissioners, because the petitioner's balance-sheet did not correspond with the balance-sheet produced by *Joseph Hall*, and because the petitioner would not alter his balance-sheet so as to make it correspond with the balance-sheet of *Joseph Hall*, and which the petitioner could not conscientiously do, as he believed, and still does so, that his balance-sheet was correct. The petitioner's final examination was then postponed by the Commissioners *sine die*.

Although the order for allowance had never been rescinded, the payment of the petitioner's allowance had been suspended and withheld from the petitioner since the 4th October 1832, notwithstanding many applications for its payment; in consequence of which the petitioner and his family had been destitute of the means of support, and had been obliged to apply for parochial relief.

Mr. *Montagu*, in support of the petition. The stat.

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6 Geo. 4. c. 16. s. 114., enacts, " that it shall be lawful for the Commissioners, before the choice of assignees, and after such choice, for the assignees, with the approbation of the Commissioners, testified in writing under their hands, from time to time to make such allowance to the bankrupt out of his estate, until he shall have passed his last examination, as shall be necessary for the support of himself and his family." The allowance has been ordered by the Commissioners pursuant to the act, with the consent of the assignees, and that order being now on the proceedings, the assignees have no power to withhold it. The bankrupt is therefore entitled to its payment henceforth, and as a necessary consequence to the arrears also.

With regard to the adjournment, the Commissioner, had he thought the bankrupt's conduct improper or contumacious, or if he had deemed his answers as to the balance-sheet insufficient, should have committed the bankrupt at once to prison, so as to have afforded him an opportunity of trying the question upon habeas corpus. The consequences of the adjournment *sine die* fall much more severely on the bankrupt, in this instance. The Commissioner may be justified, but it seems very difficult to find a reason for his being so, when the bankrupt merely declines to accede to a particular mode of taking the accounts, and therefore, in his conscience, cannot swear to the balance found by his co-partners.

Mr. *Swanston*, for the assignees, was stopped by the Court.

ERSKINE, C. J.—If the act of parliament authorized the Commissioners to make this allowance for maintenance, and having made it, the assignees refused to act upon it, then, no doubt, this Court would find means to compel them to pay it. But the act only empowers the Commissioners to make such an order before and until the choice of assignees. After assignees are chosen, they alone have, with the approbation of the Commissioners, power to make the order for maintenance; and the Commissioners alone could not make any such order, still less can this Court; and it is a matter entirely in the control and discretion of the assignees. The passing the last examination is in like manner within the discretion of the Commissioners alone, and if we order that, we could not compel the Commissioners to sign the bankrupt's certificate, so that the bankrupt would gain nothing. We can, therefore, make no order upon this petition.

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—
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HALL.

Sir J. CROSS.—It is very clear the Court cannot make the order prayed for; which is, that the allowance for maintenance may be continued till he passes his final examination. This would, in fact, operate as a premium of about 100*l.* for life, for his continuing contumacy. It would act as an inducement to his abstaining from passing his last examination. And supposing the bankrupt's view of the case, viz. that the maintenance must continue, when the order is once made, till he passes his last examination, were correct, then if he were to die without passing such last examination his assignees might be obliged to pay 2*l.* per week to his executors for ever,—a proposition most absurd. But even supposing that the assignees

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HALL.

were willing that the allowance should continue, and the Commissioners also approved of it, what, upon this petition, would be the bankrupt's position, if we made the order he prays? He says, the Commissioners ought to pass his last examination, and prays his allowance, and also that we should order his examination to pass. But the moment we made that order, or rather the moment he had in fact passed his examination, the allowance for maintenance would cease, so that he would gain nothing if he passed his examination; and besides, he would be prompted never to pass his examination.

Sir G. ROSE concurred.

Petition dismissed.

Ex parte THOMPSON.—In the matter of THOMPSON.

November 17.

There is no rule that in order to obtain a *vivâ voce* examination after a case has been heard on affidavit, such examination must have been asked for before the case was gone into.

Ex parte
Baldwin, 1
Mont. & A.
617, corrected.

Where the bankrupt vexatiously petitions to supersede for want of an act of bankruptcy, which he was evidently aware of having committed, the petition was dismissed with costs.

PRIOR to this petition being called on,

Mr. *Montagu* applied that there might be a *vivâ voce* examination directed.

ERSKINE, C. J.—We must first hear the petition (as it is so far advanced) upon the affidavits already filed.

Mr. *Montagu*. The reason of the present application is, lest we should be precluded from trying the case on a *vivâ voce* examination after it has been heard on the affidavits. It has been decided in this Court,

that an application to examine *vivá voce* should be made before the petition is heard on the affidavits, as the subsequent application would come too late; *Ex parte Baldwin (a)*.

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—
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THOMPSON.

ERSKINE, C. J.—I am not aware that we have ever laid down a rule so general. In ordinary cases, no doubt, such may be said to be the rule. But all general rules must give way to exceptions; and in all cases, if after the hearing we find that further evidence is necessary, and that a *vivá voce* examination would better enable us to reach the truth, and a proper case is made out for it, we should not hesitate to order parties to be so examined.

Sir J. Cross.—According to my remembrance of the case of *Ex parte Arnsby*, we laid down the same doctrine then which has just been promulgated by the Chief Judge.

Sir G. Rose concurred.

The petition, which was by the bankrupt for a supersedeas, on the ground of the want of a sufficient act of bankruptcy, was accordingly gone into.

Mr. *Montagu*, and Mr. *Kesne*, for the petition.

Mr. *Twiss*, and Mr. *Wright*, for the assignees, the respondents.

The Court, thinking that the petitioner, the bank-

(a) 1 Mont. & Ayr. 617.

1834. rupt, appeared fully aware he had committed an act of
 ——— bankruptcy, and that the petition was vexatiously pre-
 Ex parte sented without sufficient grounds,
 THOMPSON.

Ordered the petition to be dismissed, and the
bankrupt to pay the costs.



Ex parte JONES.—In the matter of JONES.

November 21.

The Court has a general jurisdiction to entertain questions on the legality of commitment by Commissioners upon petition without habeas corpus, and without the warrant of commitment being before it; especially where the objections to the committal would not appear on the face of the warrant.
Dubit. Sir J. Cross, as to the production of the warrant.

Quere, whether this Court has any jurisdiction to issue the writ of habeas corpus?

THIS was an application to have the bankrupt discharged out of custody. From the petition it appeared that a fiat, dated 13th March 1834, issued against the petitioner, and that on the 29th day of April following he duly surrendered himself to the Commissioners to make a full discovery and disclosure of his estate and effects, and was by them examined accordingly: and after such examination, not being then, in the opinion of the Commissioners, prepared to make a full discovery and disclosure of his estate and effects, nor to give full and satisfactory answers to the several questions then put to him by the Commissioners touching his estate and effects, they adjourned the examination until the 26th May following, when he again attended the Commissioners in order to finish his examination, and was again examined: and which last-mentioned examination was set out in the affidavit of the petitioner, and in the copy of the warrant of the petitioner's commitment filed with the petition when the petitioner was committed for not answering to the satisfaction of the Commissioners.

The petitioner being desirous of affording every in-

formation in his power, was again brought before the Commissioners, at his own request, on the 20th August last, when he rectified some mistakes which he had made in his previous examinations, through ignorance of the real state of his affairs, and through the agitation of mind he was under at the time, and through the failure of his memory, caused by anxiety of mind: and that besides his own evidence he also by his counsel tendered *Anna Lucas*, the housekeeper of the petitioner, who had kept his books for seventeen years past, and was more conversant with the state of his accounts than he was himself, to be by them examined as a witness on behalf of the petitioner, and who could have satisfied the Commissioners on various matters connected with the petitioner's estate and effects, which he could not do; but the Commissioners refused to receive the evidence of *Lucas* on such matters, and the petitioner was thereupon re-committed to prison for not answering the Commissioners to their satisfaction.

That it was utterly beyond his power to give any further information upon the matters on which he has been examined by the Commissioners, than that which he had already given; and that *Lucas* had ample means of giving such information, and was willing to do so if allowed to be examined as a witness. The petition prayed for his discharge.

Mr. C. Jones, for the petitioner.

Mr. Swanston, and *Mr. Temple*, for the assignees, stated there were two preliminary objections to this petition being gone into; the first was, that the warrant was not before the Court; and the second, that

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the object of the petition could only be obtained by a writ of habeas corpus and not upon petition.

By 6 Geo. 4. c. 16. s. 39., it is enacted, " that if any person be committed by the Commissioners for refusing to answer, or for not fully answering, any question put to him by the said Commissioners, they shall in their warrant of commitment specify every such question ; provided, that if any person committed by the Commissioners shall bring any habeas corpus in order to be discharged from such commitment, and there shall appear on the return of such habeas corpus any such insufficiency in the form of the warrant whereby such person was committed, by reason whereof he might be discharged, it shall be lawful for the Court or judge before whom such party shall be brought by habeas corpus, and such Court or judge is hereby required to commit such person to the same prison, there to remain until he shall conform, unless it shall be shown to such Court or judge by the party committed that he has fully answered all lawful questions put to him by the Commissioners ; or if such person was committed for refusing to be sworn, or for not signing his examination, unless it shall appear to such Court or judge that he had a sufficient reason for the same : provided also, that such Court or judge shall, if required thereto by the party committed, in case the whole of the examination of the party so committed shall not have been stated in the warrant of commitment, inspect and consider the whole of the examination of such party, whereof any such question was a part ; and if it shall appear from the whole examination that the answer or answers of the party committed is

or are satisfactory, such Court or judge shall and may order the party so committed to be discharged."

That the Court cannot decide on the validity of the warrant without having it before them, is, we submit, too clear for argument. Upon the second objection, the constant practice was, in Lord *Eldon's* time, to grant this application on habeas corpus; though we admit there have been instances where it was done on petition. In *Crowley's case* (a), Lord *Eldon* went very minutely into the subject of the writ of habeas corpus, and all the authorities are collected and gone through in his judgment. He therein says (b), "The Court has in several instances, on petition, ordered the discharge of persons committed by the Commissioners; sometimes ordering the Commissioners to discharge him, sometimes the gaoler, passing over the Commissioners. The instances however are not numerous. One of the earliest is *Ex parte James* (c) in 1719." In *Ex parte Lingood* (d), on the petition of a bankrupt committed by one of the common law judges, on the certificate of the Commissioners of his refusal to attend their summons, Lord *Hardwicke* said, "It is an entire new question, and quite a new case, and therefore at the first opening of it I had great doubt whether I could properly determine the legality of the commitment, as a habeas corpus might have been sued out and have been decided by the judges of the common law, which is the ready way. But I do remember a case of *John Ward* before Lord Chief Justice *King*, not unlike the present, where he determined a commitment by Commissioners of bankrupt to be justifiable, after he had taken some time to consider of it." A like practice occurred in

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JONES.

(a) 2 Swan. 1. (b) *Id.* p. 30. (c) 1 P. W. 610. (d) 1 Atk. 240.

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Ex parte Brailsford (a), 13th October 1725, and in the bankruptcy of *Thomas Mace* (a), in September and December 1728. Mr. Cullen, in support of the writ, then said, "It was understood that your lordship, in *Taylor's case* (b), had decided that a bankrupt under commitment for not answering, could not be discharged on petition, but must obtain a writ of habeas corpus. That rule is consistent with Lord *Loughborough's* decision in *Ex parte Nowlan* (c);" and, he added, "The question, however, is not material to the present case, the bankrupt being brought before the Court by writ of habeas corpus."

Mr. C. Jones, for the bankrupt, was not called on to argue against the objections.

ERSKINE, C. J.—If this were a question arising on the habeas corpus, or under the 6 Geo. 4. c. 16. s. 39., we could not decide it without having the warrant before us; neither could we if it were upon the validity of the warrant itself. But this is a petition by the bankrupt complaining of the course which the Commissioners took upon his examination, and is presented upon a ground wholly independent of the warrant; and the question is, whether we are to hear the petition and see if the bankrupt is entitled to the relief he asks. When the petition is gone into, it may or may not raise a question as to the validity of the war-

(a) See these cases, 2 Swan. 31 to 38, notis.

(b) 8 Ves. 328; and see *Ex parte Tomkinson*, 10 Ves. 106; *Ex parte Hiams*, 18 Ves. 237.

(c) 2 Swan. 29, 30. Some traces of this case are to be found in 2 Rose, 401, 6 T. R. 118, 11 Ves. 510, before Lord Eldon.

rant. If it does raise such a question, we must then of course have the warrant before us : we could not discharge him without seeing it. But its absence now does not, in my judgment, form a tenable preliminary objection to the hearing of the petition. And if the only question be upon the sufficiency of his answers, or the course the Commissioners took in the mode of his examination, we, having the examination on the proceedings before us, can, from them, determine such a question without the warrant ; for the proceedings are the original from whence the warrant itself is made out. I cannot concede that a writ of habeas corpus would alone have been the proper mode of proceeding ; but I think that a petition may be not only a proper course, but the best course to adopt ; for if, on going into the merits of the petition, we find that it all turns upon the course the Commissioners have adopted, and that they ought to have examined the bankrupt's housekeeper, as he contends for, we should not order the gaoler to discharge the bankrupt, but should merely intimate to the Commissioners that they ought to continue the examination. For this purpose merely a habeas corpus cannot be necessary, and a petition is by far the less expensive mode of proceeding. It is also the most efficient ; for supposing the bankrupt had sued out a writ of habeas corpus, and had, as he might have done, procured himself to be brought before one of the common law Courts of Westminster Hall, and upon that occasion it should seem to the judge of that Court necessary that further evidence should be taken, or that other witnesses should be examined,—would, let me ask, that judge have any power to order the Commissioners to proceed for that purpose ? Certainly not ;

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and I think that circumstance concludes the question of the propriety of petitioning. But, moreover, if the mode adopted by the bankrupt, of bringing this case before us, had been upon habeas corpus, we could not have travelled out of the warrant. We could not, as we may do on petition, hear objections to the commitment, other than such as would arise from what appeared on the face of the warrant itself. Now the objection which the bankrupt makes is, that the house-keeper was not examined, and that if she had been, her answers would have proved satisfactory. This, then, would not necessarily, and in all probability could not, appear upon the warrant, and we could not on habeas corpus have gone into that part of the case. I therefore think that a petition is the proper course to pursue towards remedying the evil of which the bankrupt complains, and, therefore, that we must go into the merits of the one before us.

Sir J. Cross.—This, I will venture to say, is as important a question as ever came before this Court. The question is, whether we shall assent to the prayer of a petition which seeks to discharge the bankrupt out of custody upon a warrant of the Commissioners? And it must not be lost sight of, that the petition asks the bankrupt's discharge, and not merely a further examination. It is objected on the part of the assignees, that this cannot be done without having the warrant produced: and if that objection be well founded, we ought not to be called on to go through an elaborate investigation upon this petition, which must end in nothing. I think, however, that it must be ceded that we have jurisdiction upon petition to hear questions

somewhat of this nature upon petition. But I do not think we can proceed to discharge the bankrupt in this case without having the warrant before us. Supposing it turns out that the commitment was not for the insufficiency of the bankrupt's answers, how can we decide the commitment to be illegal without seeing the warrant? Many cases have been cited upon this subject, but in none of them does it appear that the warrant was not before the Court. And should the Court proceed to hear the merits of the petition, how then can it act? We can have no power over the Commissioners to order the bankrupt to be discharged; we cannot call on them to be satisfied with his answers. That rests entirely in the breasts of the Commissioners; and, as in the case of signing of a certificate, no Court can exercise any control over them. The only power we should have would be over the gaoler, and then we must have him and the warrant and the bankrupt before us upon a habeas corpus; though the expense of bringing the first and last actually into Court might be saved by consent. I think if we proceed to hear this question on petition we shall sanction a breach of all precedent. No other Court would, I am sure, listen for one moment to this application without having the warrant before it; and I much question whether, if we made the order for the bankrupt's discharge on the gaoler, he would be justified in obeying it. He is liable to a very heavy penalty if he let the prisoner go without a sufficient authority; and if he discharged him except under the writ of habeas corpus, it is questionable whether he would not be liable to the penalty.

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Sir G. ROSE.—I shall be misunderstood if in any thing I should say I am taken to imply that we have any power in this proceeding over the gaoler. But, as far as these preliminary objections are concerned, I think it must be ceded that we have a general jurisdiction upon petition touching the discharge of bankrupts who have been committed. We must, at all events, hear this petition, and then it will be time to say whether we will exercise such jurisdiction as we have, or whether it will be necessary to resort to the writ of habeas corpus. The question here may be, and indeed appears to be, quite independent of the warrant; and were we to proceed by habeas corpus, and then, as we must do, confine ourselves strictly to what appears on the face of it, we may be doing the bankrupt great injustice. What he says is, that true his answers on examination may appear unsatisfactory, but that he tendered other evidence which would have made his answers, which before appeared unsatisfactory, perfectly sufficient. Now the warrant would only contain his answers, such as they actually appeared to be, in the absence of the other evidence tendered, and upon the face of the warrant his commitment would appear justifiable, and we should accordingly be bound to re-commit him, and could pay no attention to what he alleges would be the effect of the additional evidence which the Commissioners rejected. For these reasons the objections, as preliminary, are not, I think, sustainable, and we ought to hear this petition.

True it is that Lord *Eldon* had been in the habit of refusing to attend to these applications upon petition, but I confess I have always perhaps felt a prejudice against such his practice. But let us examine whence

that practice arose. It is within every one's observation that the moment a person in any pecuniary difficulties is thrown into prison, numerous detainers against him are instantly lodged with the gaoler. If such were the case where the party is committed by Commissioners in bankruptcy, although the Commissioners, over whom the Lord Chancellor had undoubted jurisdiction, might be directed by the Lord Chancellor to discharge him; and they might direct the gaoler to do so accordingly, yet on account of the other causes of detention, the gaoler would be justified in refusing to obey the order; and, upon petition, the Lord Chancellor would have no controlling power over him to enforce obedience to the Commissioners' order. But if the case were presented to him upon habeas corpus it would be very different; there the Lord Chancellor would have power also over the gaoler, notwithstanding the detainers, which would fall to the ground; on the illegality of the original commitment being shown, the Chancellor could at once discharge the party. Therefore he preferred proceeding by habeas corpus. And if I saw clearly that we had power to issue and proceed upon the writ of habeas corpus, I confess I also might be induced to prefer it, for the same reasons.

But this is a subject on which great doubts dwell in my mind. It is true that all the powers which the Lord Chancellor had in bankruptcy are, by the 1 & 2 Will. 4: c. 56. s. 2., transferred to this Court; but did the Lord Chancellor issue and determine upon the writ of habeas corpus as sitting in bankruptcy? I am inclined to say, certainly not. He did so as sitting on the common law side of the Court of Chancery, and the

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orders he made were never drawn up by the officers in bankruptcy, but by the Registrar in Chancery. Neither the Master of the Rolls, nor the Vice-Chancellor, ever exercised such a jurisdiction. The administration of the law in bankruptcy never gave them such power. But it was done by the Lord Chancellor alone, and as Chancellor only, and not as judge in bankruptcy; and I therefore am at present of opinion that such a power was never transferred to this Court, and that we have no power to deal with the writ; at least our power is doubtful, while over the Commissioners, to compel them to hear further evidence, (which is said to be the object of the present petition,) we have undoubted authority by means of the intimation of our opinion. It is true we could not compel the Commissioners to be satisfied with the bankrupt's answers, and might not have power, therefore, of ourselves to order the bankrupt's discharge. But even to that extent, an intimation from the Court of its propriety would be, as it has been for years, of sufficient efficacy; and, at all events, as far as regards compelling them to hear further evidence, I am far from saying that this Court has not the means of compelling the Commissioners to obey the Court's order to that intent.

Sir J. Cross.—I was perhaps premature in expressing any opinion that this Court had power to issue the writ of habeas corpus. The question is not now before the Court, and I confess what has just fallen from Sir *G. Rose* has occasioned me to entertain some doubts upon the subject. Yet, regarding this as indisputably a matter in bankruptcy, I cannot but think that such power over the subject-matter as the Lord

Chancellor had, and was wont to exercise, we should have under section 2 of the 1 & 2 Will. 4. c. 56., and that we might therefore issue the writ in this case. But I give no judicial opinion upon the subject.

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ERSKINE, C. J.—I do not at present wish to give any decided opinion upon that branch of the subject; but I cannot think our jurisdiction to proceed by habeas corpus is so clear as to induce me to let go our very manifest jurisdiction upon petition.

The petition was then gone into, but it appearing that the commitment arose out of answers given by the bankrupt to questions which would not be cleared up by the additional evidence proposed to be adduced,

The Court dismissed the petition with costs.

EX PARTE NATHANIEL GOULD and WILLIAM WHITMORE, the Creditors and the Official Assignees.—In the matter of JOHN ROBERTSON.

IN this case the commission issued on the 23rd May 1822, and the petitioners *Nathaniel Gould and John*

November 22.

A. and B., partners, were solicitors to the commission.

More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee till within six years. Beyond the six years *A. and B.* (upon an agreement that *A.* should pay all the debts) dissolved partnership; and the assignee, with knowledge of this fact, continued to employ *A.* alone as the solicitor to the commission, and no attempt was made to charge *B.* with the monies received by *A. and B.* till very lately, viz. when an official assignee was appointed. Nor had *B.* ever acknowledged any liability to account:—Held, first, that, as between *B.* and the creditors, neither the statute of limitations, nor laches, nor other conduct of the assignee, would operate as a bar, *A. and B. being solicitors to the commission.* But, secondly, that as the assignee was able to recoup the estate, he could not, under such circumstances of conduct on his part, call on *B.* to account. *A.* had become bankrupt; *semble*, nevertheless, that he or his assignees were necessary parties.

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Wybergh Shaw, and *James Stonehouse*, were, on the 23d June 1822, chosen assignees.

Knight and *Fyson*, under the firm of *Knight and Fyson*, were the solicitors to the commission, in which capacity large sums, being part of the estate of the bankrupt, came into their hands. The effects of the bankrupt consisted almost exclusively of demands for the enforcing and recovery of which it became necessary to institute legal proceedings, which was accordingly done; and the sums recovered in respect thereof were received by *Knight* and *Fyson*, as such solicitors to the commission, and as attornies in the actions, to the amount of 4868*l.* 10*s.* 4*d.* And they also received sums of money in respect of the costs of some of the actions; and also 130*l.*, which was paid to them by check by Mr. *Neale*, on account of the bankrupt's estate. Out of the monies so received they made various payments, on account of the bankrupt's estate, to the amount of 3658*l.* 5*s.* 6*d.* About the year 1824 *Shaw* became bankrupt. In March 1825 an audit meeting was held, in the matter of the bankruptcy of *Robertson*, for the purpose of auditing the assignees' accounts and declaring a dividend, when an account of the receipts and payments under the bankruptcy was produced and allowed by the Commissioners, in which *Gould* was debited with the sum of 3364*l.* 0*s.* 9*d.*, part of the 3658*l.* 5*s.* 6*d.* which *Knight* and *Fyson* had paid into the bankrupt's hands; and he was credited with various payments made on account, amounting to 311*l.* 9*s.*, but he was not credited with any of the payments made by *Knight* and *Fyson* in respect of the actions which had failed; and on the account there

appeared to be a balance due from *Gould* of 3052*l.* 11*s.* 9*d.* The account was drawn up and prepared by *Knight* and *Fyson*, and *Gould* was thereupon informed that the difference between the 3364*l.* 0*s.* 9*d.* and 4500*l.*, part of the 4868*l.* 10*s.* 4*d.* which was recovered from a debtor to the estate, was retained by *Knight* and *Fyson* on account of their costs incurred, not only in that action, but generally as solicitors under the commission, and that the sum of 3364*l.* 0*s.* 9*d.*, which had been paid into the bank, was all the money which it was necessary for *Gould* to account for. *Knight* and *Fyson* further represented to *Gould*, that the other sums received of them would be set against the costs incurred and due to them in the several actions, and the costs which they had paid in respect of the actions which had failed, and that the same would properly form the subject of a future account, and ought not to be introduced into the account then to be audited. *Gould*, confiding in the representations of *Knight* and *Fyson*, and the correctness of the account so drawn out by them, signed and verified the same. At the meeting a dividend of 1*s.* in the pound was declared, the total amount of which dividend was 1955*l.* This sum was paid over by *Gould* and his co-assignee to *Knight* and *Fyson*, for the purpose of their paying the dividend to the creditors who should apply for the same.

The partnership between *Knight* and *Fyson* was dissolved in May 1826.

In the early part of the year 1826 *Gould* was in Holland, but on his return to England, in the month of August 1826, he wrote to *Knight* (to whom it is alleged by him and *Fyson*, that *Knight* and *Fyson* had en-

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trusted the principal management of matters connected with the bankruptcy,) a letter dated the 21st August 1826, urging him to have all accounts, relating to the affairs of the bankruptcy, brought to a final settlement. *Knight* delayed, under various pretences, to furnish any account, and *Gould* finally threatened to institute proceedings against *Knight* and *Fyson*, in default of his receiving such account. In October 1827, *Gould* received from *Knight* an account entitled, "Dr. *Knight* and *Fyson*, in cash account with the estate of *John Robertson*, Cr." which account was as follows:—

A

Dr.	KNIGHT and FROX in Cash Account with the Estate of JOHN ROBERTSON.			Cr.			
	£	s.	d.		£	s.	d.
1822.				1822.			
January 24. To cash per Mr. Laughton ..	17	0	0	September 25. By cash, per check of Parker and Co.	49	7	4
July 15. To ditto Mr. Veale ..	10	0	0	1823.			
1824.				May 2. By ditto, Fleming's balance due to estate.	38	11	0
February 12. To ditto for check, Messrs. Dowell & Co. tax-				1824.			
ed costs in Longbottom and Fleming ..	16	18	6	February 4. By ditto, of Alliston and Co., amount of			
26. To ditto Messrs. Buckle, Bagster, and Bucha-				debt in action Shaw v. Williams, as			
nan ..	135	19	3	agreed ..	4500	0	0
To ditto to you 500 <i>l.</i> and 2864 <i>l.</i> 9 <i>d.</i> ..	3864	0	9	By ditto, per check, (Veale,) Qy. Whence			
28. To ditto Mr. Duncan ..	4	7	0	comes this, as it is drawn from the bank ?	130	0	0
May 18. To ditto Mr. Veale ..	100	0	0	December 16. By bill of Denison and Co., being amount			
1825.				of debt due from ..	129	7	0
March 29. To ditto Mr. Veale, for Mr. Shaw ..	10	0	0	1825.			
Amount costs ..	1200	0	0	January 12. By cash of Mr. Henry, amount agreed to be			
Balance ..	138	19	10	taken in full for debt and costs ..	150	0	0
				Paid the Jailor ..	..	..	..
				Mr. G. 90 <i>l.</i> 8 <i>s.</i> 6 <i>d.</i>			
				March.			

" 1827, October 10. At a meeting this day the items called assets were looked over, and Mr. Knight was ordered to agree with Mr. ———, to take means to get the 500*l.* from the Transport Board, and divide it with him; to endeavour to persuade Mr. White to join him in measures to get 1100*l.* out of Chancery, or to proceed for the same; to look into sundry accounts and ascertain their state and prospects. The post obit for 500*l.* was reported by Mr. Stonehouse as likely to be forthcoming, the father of the party being in his eighty-third year; but he thought the matter ought to be kept quiet for fear of prejudice to the young man's prospects. It appeared that the amount of the unpaid dividends in Mr. Knight's hands, which he had received, was 170*l.* 14*s.* 6*d.*"

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In this account *Knight* and *Fyson* appeared to be debited with several sums received by them from the several persons on account of the estate, amounting in the whole to 4997*l.* 5*s.* 4*d.*, and were credited with the several sums before mentioned to have been paid by them on account of the said estate, including the 5364*l.* 0*s.* 9*d.*, and amounting in the whole to 3658*l.* 5*s.* 6*d.*, and they also took credit for 1200*l.* as the amount of their costs, no bills of costs having been then delivered; and upon the account there appeared to be a balance of 138*l.* 19*s.* 10*d.* due from *Knight* and *Fyson* to the estate. The account was stated to be incorrect in various particulars mentioned in the petition, the bill of costs of *Knight* and *Fyson* relating to the bankruptcy, when taxed as after mentioned, including the costs of the actions, amounting only to 1056*l.* 17*s.* 7*d.*, leaving a balance of 461*l.* 19*s.* 3*d.* in their hands. At the same time *Knight* furnished *Gould* with another account, entitled, "*Knight and Fyson in Cash Account with the Assignees of John Robertson*," which stood as follows:—

B.

Knight and Fyson in Cash Account with the Assignees of John Robertson.

Dr.				Cr.				
To amount of 51 dividends paid as per list, and receipts.....	£.	s.	d.	1825. March 23.	By cash, per check, to pay dividends....	£.	s.	d.
Amount not paid.....	1784	5	6			1955	0	0

There appeared to be a balance of 170*l.* 14*s.* 6*d.* due from *Knight* and *Fyson* to the estate in respect of the dividends. *Gould* did not receive any bill of costs of *Knight* and *Fyson* relating to the bankruptcy; at the time the accounts were furnished to him, or until July 1833, when the same was delivered in consequence of the

proceedings of *Gould*. *Gould* applied to *Knight*, on behalf of *Knight* and *Fyson*, to take steps for auditing and finally settling the accounts, and he from time to time promised so to do, but took no proceedings for that purpose. In the early part of the year 1828 *Gould* went abroad to America, and did not return till October 1828. In July 1829 a commission issued against *James Stonehouse*, who died shortly afterwards. On *Gould's* return from America, and in October 1828, he made applications to *Knight*, on behalf of *Knight* and *Fyson*, for the books and papers relating to the bankruptcy, and for a statement and settlement of the accounts, but he received no answer to such applications. *Gould* since discovered that *Knight* had then absconded from his creditors, and did not return until the latter part of the year 1830; and, on his return, a commission issued against him. At a meeting of the creditors of *Robertson*, on the 19th April 1831, *Gould* was appointed sole assignee. During the year 1831, and previously to October 1832, *Gould* caused repeated applications to be made, as well to *Knight* as to *Fyson*, for the purpose of obtaining a statement and settlement of the accounts, and the particulars of their bill of costs, but they, from time to time, neglected to comply; *Fyson* alleging that *Knight* having had the whole management of the affairs, was the only person who could make out the proper accounts; and *Knight* alleging, that the assignees under his commission, or *Fyson*, had possession of all the books of the firm of *Knight* and *Fyson*, and that without such books he could not make out the accounts. In October 1832, an application was made, on behalf of *Gould*, to Mr. Commissioner *Fane*, for an order and summons to

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compel *Knight* and *Fyson* to account for their receipts and payments on account of the estate; and thereupon the petitioner, *William Whitmore*, was appointed official assignee. *Whitmore* repeatedly endeavoured to obtain a settlement of the accounts from *Knight* and *Fyson*, without success. In January 1833 the petitioners applied for and obtained a summons from the Commissioner, in pursuance of which *Knight* attended the Commissioner, but *Fyson* did not attend; and the Commissioner issued a new summons for the attendance of *Knight* and *Fyson* on the 2d February 1833. On the said 2d February 1833, *Knight* and *Fyson* attended before the Commissioner, and *Fyson* contended that he was not liable for any of the sums received by *Knight* and *Fyson* on account; but the Commissioner was of opinion, that *Knight* and *Fyson* were jointly liable for such monies, and thereupon *Knight* and *Fyson* promised to render an account, and to deliver in the particulars of their bill of costs, within a month from that date. The delivery of the bill of costs was, by various pretences, delayed till July 1833, and no account of the receipts and payments of *Knight* and *Fyson*. *Gould* immediately caused the bill of costs to be taxed, but *Knight* and *Fyson* did not either of them attend on the taxation, although served with summonses for that purpose; and on the 18th September 1833 the Commissioner taxed the costs at 1011*l.* 15*s.* 7*d.* exclusive of the costs of the action against *Mudie*, which amounted to 45*l.* 2*s.* After the taxation, *Gould* made several applications to *Fyson* for a statement of the account and payment of the balance. But such applications having proved unavailing, the petitioners obtained another summons, in pursuance of which

Fyson attended before the Commissioner on the 9th February 1834, and was examined; when he stated his ignorance of the affairs of *Knight* and *Fyson*, but promised that if a copy of the account furnished by *Knight* was delivered, he would examine it with the books of the firm, with a view of ascertaining its correctness. A copy was accordingly furnished him, and he was again examined, and in his examination, signed by him, stated that he had examined the two accounts marked A. and B., being the two accounts hereinbefore mentioned to have been delivered to *Gould* in October 1827, with a ledger of the late firm of *Knight* and *Fyson*; that the two first items, on both sides the account, were not in that ledger, and that the previous ledger had been mislaid, but that the ledger which *Fyson* did see commenced with bringing forward a balance on the debit side of the account of 27*l.*, corresponding in amount with the two first items on that side of the account A.; that on the other side of the account there was a balance or sum brought forward exceeding the amount of the two first items on that side of the account by 1*l.* 5*s.*; that the sum of 130*l.* on the credit side of account A. was twice credited and once debited, leaving the result in that respect the same as in account A.; that there were four items in the ledger for costs, two for monies received for costs, and two for bills of costs, making a difference of 71*l.* 3*s.* 11*d.* in favour of the estate; that the item of 1200*l.* of course did not appear in the books. And he stated that he believed the account A., subject to the above observations, to be a correct account of the monies received and paid by the late firm of *Knight* and *Fyson*, on account of the estate; and, from an examination of the ledger

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to which he referred, he believed that the item of 4500*l.* and the three following items on the credit side of the account A., were received by *Knight*, on account of the firm of *Knight* and *Fyson*, at the respective times mentioned in that account. And he stated, that he found, by an examination of the same ledger, that a sum of 1955*l.* was received by *Knight*, on account of the firm, for the purpose of paying dividends, and that it was credited in the same account, with other items, to the estate of *Robertson*, as cash received to pay dividends. And *Fyson* further found by the ledger, that sums were paid by the firm on account of dividends, to the amount of 1723*l.* 18*s.* 5*d.*, or 10*s.* more or 10*s.* less. And he stated, that in reference to the items relating to the bills of costs which were in the ledger, and were not mentioned in the account A., there was a debit and a credit of 45*l.* 2*s.* in respect of the action against one *Mudie*, and a sum of 133*l.* 10*s.*, credited as received for costs, in respect of the action against Messrs. *Williams*, a sum of 61*l.* 3*s.* 1*d.* charged to the debit of the account, as the amount of the taxed bill to the choice of assignees; and further, that if that item was included in the bill delivered by *Knight* to the assignees, it would make the cash balance so much the larger; and he further stated, that he generally made the entries in the cash book of the firm.

By the petition it was contended, according to such statement of *Fyson* and the corrections made by him in the account A., there remained a sum of 468*l.* 9*s.* 3*d.* due to the estate of the bankrupt in respect of the sums received by *Knight* and *Fyson* as solicitors under the commission, for the behoof of the creditors, exclusive of the 170*l.* 14*s.* 6*d.* being the amount of divi-

dends left in their hands and not paid over by them; and that *Fyson* ought to pay the sums to the petitioners, they being willing, on being indemnified by him, to permit him to use their names in any proceedings which he might be advised to take against *Knight* or his assignees. And the petition prayed that *Fyson* might be ordered to pay to the petitioners the sum of 461*l.* 19*s.* 3*d.* and 170*l.* 14*s.* 6*d.*, together with interest, or for an account of all sums of money received by *Knight* and *Fyson* on account of the estate, and all payments made by them on account of the estate, including all sums due to them from the estate in respect of their bills of costs as solicitors under the commission; and also to take an account of all sums of money received by them for the purpose of paying the dividend declared under the commission, and not applied by them in payment of such dividends, and for interest thereon.

In answer to the petition an affidavit was sworn by Mr. *Fyson*, which stated that the partnership between *Knight* and *Fyson* was dissolved on the 12th May 1826, and that notice of such dissolution was only advertised in the London Gazette of the 13th of May 1826. That the memorandum of the dissolution contained (*inter alia*) the following stipulation or agreement,—“ All debts owing by the present firm of *Knight* and *Fyson* to be paid by Mr. *Knight*.” That immediately upon dissolution deponent entered into partnership with *Beck*, and took offices in Lothbury, and that the clients of the firm of *Knight* and *Fyson* either caused their papers to be removed to deponent's new firm of *Fyson* and *Beck*, and confided their business to such new firm, or left the same with

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Knight at his offices in Basinghall Street, and employed him to conduct their business on his own individual account as their separate solicitor. That the assignees of *Robertson*, after the dissolution, and with full knowledge thereof, employed *Knight* as their separate solicitor in the business of the commission. That deponent apprised all persons who applied to him for the payment of any sum of money owing by the firm of *Knight* and *Fyson*, that Mr. *Knight* was bound to pay every outstanding engagement of that firm. That *Knight*, who continued to carry on business on his separate account at Basinghall Street aforesaid, from May 1826 down to about November 1828, would have paid the assignees any demand they might have had upon him, if proper steps had been taken by them for that purpose in the year 1826, or in the year 1827. That subsequent to the interview with *Gould*, referred to in deponent's examination, on the 24th of March, no application was made to deponent touching the commission, or the proceedings thereunder, or the accounts of papers relating thereto, until on or about the 27th November 1832, except that deponent believes, that in or about December 1831, and January 1832, Messrs. *Haslam* and *Bischoff*, the present solicitors of the assignees, or one of them, called at the office of deponent for the purpose of speaking to deponent respecting the commission, or matters relating thereto, but deponent, being unacquainted with the business and affairs of the commission, referred them for any information they might require to *Knight*, and the deponent had not, as he believes, any personal interview with them on the subject until the deponent was summoned to attend before the Commissioner in the beginning of 1833; but that

about the 27th November 1832, deponent received a letter addressed to *Knight* and *Fyson* from Mr. *William Whitmore*, requesting to be furnished with their bill of costs, of which letter a duplicate was also sent to Mr. *Knight*. Which letter the deponent answered as follows:—"In answer to your letter of yesterday I beg to state, that during my partnership with Mr. *Knight* the business of this commission was conducted by him exclusively, and that at the dissolution of our partnership, which took place in May 1826, the proceedings were continued with him by the assignees. *Samuel Fyson*." That the first summons served on deponent was on the 2d February 1833, when the deponent attended before the Commissioner. That the question whether or not deponent was liable for any of the sums of money used by *Knight* and *Fyson*, on account of the assignees, had never been discussed before the Commissioner, nor had the grounds upon which deponent contended that he was not liable been ever stated to the Commissioner. That on the 16th September 1833, a summons was left at deponent's office, calling upon him to attend before the Commissioner on the then ensuing Wednesday, and thereupon deponent wrote to Messrs. *Haslam* and *Bischoff*, the solicitors of said assignees, begging them to postpone the meeting, and then proceeded as follows:—"A summons was left with one of my clerks this morning, calling upon me to attend a meeting before Mr. Commissioner *Fane*, on Wednesday, with the view, as I collect from the concluding paragraph, of finishing the taxation of the bills made out and rendered to you by Mr. *Knight*, under the commission against Mr. *John Robertson*. As regards the taxation of the bills it is impossible that I can render any assist-

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ance, being (as I have already stated) wholly unacquainted with every part of the business transacted under that commission. You are aware that I do not consider myself in any way responsible or accountable to the assignees, but if it be wished that I should attend the commission, I shall be ready to do so at any time after the present week. *Samuel Fyson.*"

Messrs. *Haslam* and *Bischoff* wrote to deponent in answer as follows:—" *Re Robertson*. Sir, The object (of the meeting) is to complete the taxation of the bill, and get the Commissioner's allocatur, in order that the cash account may be completed, and the correct balance in the hands of *Knight* and *Fyson* ascertained, for which the assignees hold you liable. If this is to be the subject of further proceedings the assignees are desirous of not losing time, but I was also desirous you should have had an opportunity of stating any of your objections. *Chas. Bischoff.*" That he replied as follows, on the 16th September 1833:—"Sir,—I beg to state, that I know nothing of any cash account between the late firm of *Knight* and *Fyson* and the assignees of Mr. *J. Robertson*, and that I have never, to my knowledge, seen any such account. It seems to me, therefore, that my total ignorance of the subject-matter of the meeting on Wednesday must render my attendance before the Commissioners useless. I certainly do intend to resist any claim the assignees may make upon me in respect of any balance (if balance there was) in the hands of *Knight* and *Fyson*, when that partnership was dissolved. *Saml. Fyson.*" That from the first application made to this deponent by *Gould*, down to the present time, deponent has on no occasion acknowledged or admitted any liability to

the assignees, or made any promise to pay them any sum whatever, but had, on the contrary, always insisted that he was not liable or accountable to them. That no proceeding was ever instituted against deponent in respect of any sum of money alleged to be due to the assignees from *Knight* and *Fyson*, until he was served with the petition.

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Mr. *Bethell*, and Mr. *Follett*, for the petitioner.

ERSKINE, C. J.—I see the petition prays an account against *Knight* and *Fyson* jointly. Either *Knight*, or his assignees, ought therefore to be brought before the Court.

Mr. *Bethell*, and Mr. *Follet*, for the respondent *Fyson*, however, waived that objection.

Mr. *Russell*, for the petitioner, stated the facts of the petition.

Mr. *Bethell*, and Mr. *Follett*. The assignees now seek to charge Mr. *Fyson* with that for which they have virtually agreed they should not charge him. It is to be remembered that this is an application for the summary interference of this Court; an application which this Court could not exercise any jurisdiction over, (except so far as to refuse it,) if *Knight* and *Fyson* had not been the solicitors to the commission. But, nevertheless, to entitle the assignees to this summary assistance, they must show that they have a good *equitable* case,—that they have not (in equity at least) waived their claim against Mr. *Fyson*. It is quite clear from the facts of this case, that the assignees were fully

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aware of the retirement of *Fyson* from the partnership. With this knowledge, however, they have continued to trust *Knight* alone; and have, by continuing to employ him as the solicitor to the commission, treated him as the party solely responsible to them. This they have done ever since the year 1826; and it is now too late for them to come, upon equitable grounds, for the summary exercise of this Court's jurisdiction. If parties apply to equity it is a well-known maxim, that they must come promptly. But the present claim is barred at law by the statute of limitations. The monies now claimed from *Fyson* were, as the petition itself alleges, paid to him more than six years back. In *Short v. M'Carthy* (a), *Granger v. George* (b), *Battley v. Faulkner* (c), it was decided, that the time from which this statute would commence its operations was the cause of action, and not the period when the discovery of the cause of action took place, except in cases where the discovery was prevented by fraud.

First, then, there is no legal liability; and, 2ndly, there is no equitable circumstance entitling the petitioners to the relief which they ask, that being in effect more than a Court of law could give them. Suppose an action had been brought, the plea of the statute would have been an absolute bar; for there is no exception in the statute in favour of a case like the present; there was no continuing account as against *Fyson*, nor any fresh promise to pay the debt under Lord *Tenterden's* act (d). For it is quite clear that *Knight's* conduct could not raise a promise against *Fyson*; and even to bind himself, *Knight's* promise must have

(a) 5 B. & Ald. 626.

(b) 7 D. & R. 729.

(c) 3 B. & Ald. 288.

(d) 9 G. 4. c. 14.

been in writing, which no where appears to have been given. In a late case, where a partnership had been dissolved, and there was an undertaking by the remaining partner to pay the debt, and a creditor of the partnership, with a full knowledge of these facts, had long after continued his dealings with the remaining partner, and to trust him for the debt, (in effect, though not in fact, acquiescing in the terms of the dissolution, and regarding the remaining partner as the one solely responsible,) the Court of King's Bench would not sanction any claim against the retiring partner; and such is the modern doctrine the Courts of common law are now inclined to abide by, though they formerly held otherwise (a). The justice of such doctrine is manifest; for, as in this case, had the conduct of the creditor been different, the retiring partner might long since have compelled his former partner to pay that which, by the terms of the dissolution, he was bound to pay.

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Ex parte
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Sir G. ROSE.—The defences you set up are not conclusive, because the parties before us were the solicitors to the commission, over whom this Court would hold the power of a special interposition. The circumstances of the defence are, however, material, as they tend to guide us in the exercise of our discretion.

ERSKINE, C. J.—This Court has held parties bound even for a longer time than exists in the present case. The situation which Messrs. *Knight* and *Fyson* held was that of trustees, and they are regarded just the same as receivers in Chancery, or as assignees in bankruptcy. It is not as a question between party and party that the Court looks at it, but as between an

(a) See *Thompson v. Percival*, 5 B. & Adol. 925.

1884.

Ex parte
GOULD
and another.

officer of the Court and the bankrupt's estate, and the due administration of the effects which this Court is bound to provide for.

Mr. *Bethell*, and *Follett*. We are quite content to look at the facts as materials merely for the guidance of the Court's discretion; and we rely on the facts, especially when the Court remembers that the present application is not purely to benefit the estate; for to that the assignees, having trusted the funds out of their hands, still remain personally responsible, and *Gould* being solvent the estate can suffer no injury. This should be looked at as a petition for the assignees' own benefit,—for his indemnity,—as a mere demand by him for money had and received; and the Court should then, in that view, deal with the facts, and decide whether, under the circumstances of the laches, of which the assignee has been guilty, the claim now made is justified against a party, who would thereby be most materially injured by the consequence of such laches.

Mr. *Russell*, in reply. First, it is said, that the subsequent dealings which were had with Mr. *Knight*, and his continued employment, have discharged Mr. *Fyson* from those liabilities which prior to the dissolution of the partnership he had clearly incurred, both as a partner and also as one of the solicitors to the commission. And, secondly, it is said, that the lapse of time is a sufficient protection to Mr. *Fyson*.

As to the first point,—if he were merely to be regarded as an ordinary trustee, he having once taken upon himself the office, could not by any act of his

own (in this case by the dissolution of the partnership or otherwise) discharge himself of the trust. But the peculiar relation in which Mr. *Fyson* stands in this case, renders it still less possible. He was, as solicitor to the commission, with a clear knowledge that he had the funds of the creditors in his hands, in every way bound to account. When the dissolution took place he was bound to see that so important a trust as that reposed in him was fully performed; he was bound to see that Mr. *Knight* properly accounted; and he should then have wound up his accounts with the assignee. This he has omitted, and certainly if any party has been grossly guilty of laches it is Mr. *Fyson* himself. But it is said that the conduct of the assignee has discharged him; that certainly could not be; for though at law the assignee may be considered the real owner of the estate, and capable of entering into any agreement, except such as acts of parliament forbid, yet in this Court, as in every other Court of Equity, the assignee is but a mere trustee himself. It is as between the creditors and Mr. *Fyson* that the Court must say how far the conduct of the assignee is to be binding. And standing in the peculiar relation of solicitor to the commission and of trustee for the creditors, it is impossible that any conduct of the assignee could discharge him, although perhaps as between Mr. *Fyson* and the assignee simply, it might have had such an effect.

Secondly, in the case of *Pritchard v. Draper* (a), Lord *Brougham* held, that a bill which was taxable, and which had not been delivered one month before the suit was instituted, according to the provisions of

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Ex parte
GOULD
and another.

(a) 1 Russ. & Myl. 191.

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Ex parte
Gouzo
and another.

the 2 Geo. 2. c. 26. s. 23., could not form a good title to institute a bill in equity. So that the statute of limitation cannot apply to this case, as this claim could not arise until after the taxation of the bill, which is considerably within the six years, when only it could be ascertained what the balance due from *Knight* and *Fyson* really was. Besides, the situation of Mr. *Fyson* standing in the relation of solicitor to the commission, was that of trustee for the benefit of the creditors of the bankrupt, under whose commission they had proved; and it has, in numberless instances, been decided, that a trust takes a case out of the operation of the act.

ERSKINE, C. J.—This is not the case of an application at the instance of creditors, calling upon the assignee and the solicitor to the commission to account for monies come to their hands, and praying the Court to exercise its jurisdiction for the protection of the bankrupt's estate; but it is an application by the assignee simply, directed against Mr. *Fyson*, who was his agent; and it seeks to render him responsible for monies belonging to the assignee (and for which the assignee is liable to the creditors) which have come to the hands of Mr. *Fyson* and his partner; availing himself, in applying for assistance to this jurisdiction, of the fact of such solicitor being the special officer of this Court, in his character of solicitor to the commission.

Had this been an application by the creditors, the defences set up by the respondent could in no way avail him. Being a trustee, as to them, the mere length of time would not have assisted him; neither would the circumstance of the assignee's neglect to call

for and obtain an earlier settlement of account, have barred the claim by creditors. For, by establishing any other doctrine, we should open the door to every kind of fraudulent collusion between the solicitor and the assignees. In the case of *Ex parte Carter, in re Boldero*(a), and that class of cases, it has been intimated, that rather than that the estate should suffer through the insolvency of the assignees, the solicitor should be made responsible to the creditors in the first instance. But this is an application in effect (although, *pro forma*, the official assignee is joined,) by Mr. Gould himself, seeking to exonerate himself from the responsibility he has incurred through trusting to too great an extent one of two partners by casting the burthen on to the shoulders of the other and innocent partner. His demand arises from transactions so long back as 1826. It was then his duty to have taken a proceeding like the present against Mr. *Fyson*. But this he omitted, trusting *Knight* alone. Unless he had desired that it should be understood that he trusted *Knight* alone, he should at that time have called in all outstanding funds alleged to be then in the hands of *Knight* and *Fyson*. Especially was that his duty, when he had notice of the dissolution of the partnership. Of this circumstance he was fully aware in the year 1826, and his conduct then and since will bear no other interpretation than that he considered *Knight* as alone responsible. No demand was attempted to be raised against *Fyson* till the official assignee was appointed.

Under these circumstances, and as Mr. *Gould* seems a sufficiently responsible person to guard the estate from being injured, I think Mr. *Gould* has no right

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Ex parte
Gould
and another.

(a) 2 Dea. & Ch. 626.

1834. here to call on Mr. *Fyson* to refund monies, which he
Ex parte could not be compelled to refund at law.
Gould
and another.

Sir J. Cross.—As this is simply a question between the solicitor and the assignee, and not between the former and the estate, I entirely concur in the judgment just pronounced. Looking at it in that view, *Fyson* must be regarded as having been long since discharged. Ever since the dissolution of the firm of *Knight* and *Fyson*, the petitioner, *Gould*, as assignee, continued to employ *Knight* alone as the solicitor to the commission. As to the 170*l.*, that, by the proceedings upon the audit meeting, was shown to be in *Knight's* hands alone. The dissolution was well known to *Gould* so far back as 1826, and he took no proceedings against Mr. *Fyson* till the official assignee was lately appointed. His conduct amounts to a clear adoption of *Knight* as his debtor, and to a complete discharge of *Fyson*.

Sir G. Rose.—For the reasons already expressed by my learned colleagues, I am of opinion, that under the circumstances of this case the Court ought not to interfere.

The petition was dismissed, but without costs.



1834.

In the matter of *HAWKER*.

MR. TAMLYN applied, on behalf of the bankrupt, that the fiat in this case might be superseded on the consent of creditors. Mr. Commissioner *Holroyd* had refused to sign his certificate of the consent of creditors to the supersedeas, upon the ground that the fees payable under 1 & 2 *Will.* 4. c. 56. ss. 45. 46., viz. 10*l.* to the secretary of bankrupts on issuing the fiat, and 20*l.* payable by official assignee on the choice of assignees, were not paid. No affidavit was produced of these facts.

December 22.
Samble, this Court has no jurisdiction to order the Commissioner to certify the consent of creditors to a supersedeas, especially when he objects because fees payable under 1 & 2 *W.* 4. c. 56. ss. 45, 46., are not paid.

The COURT refused to make any order, as there was no affidavit; but intimated that they could not interfere, it being a matter entirely in the breast of the Commissioner.

Application refused.

Ex parte SOPER.—In the matter of *SALTER*.

MR. SWANSTON. This is an application that a creditor having proved against the joint as well as against the separate estate, may elect against which estate his proof should be retained. It comes within the principle of *Ex parte Moul*t (a). The fact of a double proof having been made did not come to our knowledge till May 1834. The petition prays consequential directions as to refunding the dividends improperly received.

December 10.
January 28.
March 14.
1835.

One of a double proof made more than six years back, ordered to be expunged according to *Ex parte Moul*t. But dividends received on the expunged proof more than six years back, cannot be refunded, even though there was no chance of recouping the injured estate out of future

(a) 1 *Dea.* & *Ch.* 44; 2 *Dea.* & *Ch.* 419.

dividends from the remaining proof.
Substantial variations in order cannot be effected by motion, but only on petition to rehear.

1834.

Ex parte
Sofan.

Mr. *Piggott*, for the creditor. This application is resisted, on the ground that it is an appeal, in effect, from the order of the Commissioners, ordering the proof so long back as the year 1826. The last dividend was declared in 1828; it cannot, therefore, be recalled; *Brisbane v. Dacres* (a). By the order of the House of Lords, 24th March 1785, no appeal can be made after five years from the enrolment of the decree; and in *Ex parte Roffey* (b), Lord *Eldon* said it was high time such rule should prevail in bankruptcy.

The COURT said, this was like a payment made under mistake of law, and time would therefore bar the claim for refunding; but

Declared, that the creditor ought to elect, and that he be restrained till further order from receiving any further dividend from the estate against which he elects his proof, shall stand, and let any future dividends arising from the estate against which he elects to stand as a creditor, be applied in reimbursing the estate what he received on the expunged proof. Assignees costs out of that estate in respect of which the proof is expunged.

January 28.

Mr. *Swanston* this day moved that the minutes of the former order might be varied. That order directed that the creditor should be restrained from receiving any future dividends from the estate against which he elected his proof should stand, until further order; and that the dividends that should be declared on that estate should go to refund to the other estate against which he elected his proof should not stand, the amount

(a) 5 Taunt. 143.

(b) 19 Ves. 648.

of dividends he had improperly received. It now appeared that there was no probability of any future dividend being declared, so that there was no chance of the estate being recouped by that means. It was therefore proposed that the minutes of the order should be amended, by striking out that direction, and ordering the creditor at once to refund the amount of dividends improperly received.

1835.

Ex parte
Seymour.

ERSKINE, C. J.—We cannot grant this motion. The order of the Court has been pronounced, and the minutes are framed according to the order. In cases of any misunderstanding or mistake in the construction of the minutes, either between the parties, or in the office, in drawing up the Order, minutes may perhaps be varied on an application by motion. But that which it is now proposed to do amounts to a substantial and total alteration of the Order, one great ingredient of which was, that of declaring that after the lapse of time the party should not be ordered to refund. This cannot be done upon motion, and the only way of effecting it will be by a petition of re-hearing.

Motion refused with costs.

A petition for re-hearing came on to be heard this day, but March 14.

The COURT expressed itself satisfied with the former decision, which was made after mature deliberation, and with the knowledge of all the facts brought before it this day.

And it was therefore dismissed with costs.

1834.

Ex parte BERKELEY.—In the matter of DEACON.

December 10.
Costs come out
of estate where
equitable mort-
gagee applies
for leave to
bid and also for
sale; *scus*, if
merely for leave
to bid.

MR. AYRTON. This is an application by an equitable mortgagee for a sale of the premises, and for leave to bid; but understanding that the latter part of the prayer would fix the petitioner with the costs of the petition, we will waive that part of it.

Mr. *Swanston*, for the assignees, was not instructed to consent that the costs should come out of the proceeds of the sale, but acceded to the rest of the prayer of the petition.

The COURT, however, said that such consent was unnecessary. The rule as to costs being paid by the petitioner in such cases, only exists where the sole object of the petitioner is for liberty to bid, and not where that object forms a part merely of the petition. If the sale had been already ordered, and it was necessary to come upon another petition for leave to bid, it might be otherwise.

ORDERED, costs as usual, out of the proceeds of the sale.

Ex parte MARIA ANN HAWLEY.—In the matter of
THOMAS WILLIAM RICHARDS.

December 13.
Costs of pre-
paring a special
case form part
of the costs of

MR. CHING. This is a motion on behalf of the bankrupt, that the petitioner, *Maria Ann Hawley*, or appeal to the Lord Chancellor, and should be taxed by the officer in Chancery. This Court intimated its opinion to that effect accordingly to such officer.

Costs ordered against bankrupt to be set-off against those ordered in his favour.

Mr. *William Fisher*, her solicitor, may pay the costs incurred by the bankrupt of, and attendant upon, the making and settling the special case herein, and the various motions and expenses relative thereto, pursuant to the suggestion of his Honor the Chief Judge, made on the settling the special case on the 5th December 1833, as also the costs of this motion.

From an affidavit of Mr. *Fisher's* clerk, filed in opposition to the motion, it appeared that deponent had the conduct and management of the petition, and of the several matters relating thereto, under the immediate direction of Mr. *Fisher*. The petition prayed, that a certain contract or agreement, bearing date the 13th March 1828, made between *Thomas Hawley*, since deceased, and the bankrupt, might be given up by the assignees to be cancelled, the bankrupt not having paid 15*s.* in the pound under his commission, and having previously taken the benefit of the Insolvent Act. That on hearing the petition, the Court dismissed it with costs, which had been duly taxed and paid. After this, a special case of appeal for the opinion and decision of the Lord Chancellor was prepared, on behalf of the petitioner; that subsequently to the hearing of the petition, and after the special case had been prepared by counsel, several meetings were held between the counsel for the petitioner and the counsel for the bankrupt, to settle and agree upon the special case; but owing to the objections from time to time made by the counsel on behalf of the bankrupt, the completion of the special case was considerably delayed, and was not finally settled until 18th January 1834. That between the time of the hearing the original petition, and the final settlement of the special

1834.

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HAWLEY.

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case, sundry applications were made to the Court, on the behalf of the bankrupt, to dismiss the case, for an alleged want of prosecution ; but the Court made no definite order thereon until the 19th April 1834, after due notice had been given to the solicitors of the bankrupt, that the special case was set down and completed; but that, nevertheless, and owing to the statements made by the solicitor of the bankrupt, that the case was not in fact set down, the Court ordered, that the counsel for the petitioner should undertake that the case should be set down within one week from the 19th April; and the Court reserved the consideration of all costs, with liberty for all parties to apply. That the assignees of the bankrupt appeared by their counsel on the hearing of the last-mentioned motion, and insisted that the bankrupt ought to pay them the costs of their appearance, they, the assignees, having been brought unnecessarily before the Court. That the petitioner was also unnecessarily and vexatiously brought before the said Court on the hearing, and that the solicitor of the bankrupt was repeatedly informed by the deponent that the special case was set down and completed previously to the last-mentioned motion coming on to be heard. That notwithstanding the case was so set down, and deponent had repeatedly informed the solicitor of the bankrupt thereof, the solicitor for the bankrupt, on the 29th April 1834, gave Mr. *Fisher* notice that the bankrupt would again apply to the Court on the 2d May then next, in pursuance of a former notice given on the 28th February, that the special case might be dismissed with costs, as between solicitor and client, to be paid by Mr. *Fisher*, the same not having, as was alleged, been set down for

hearing: and that on the hearing of the application on the 2d May, the Court were satisfied that the case had been properly set down for hearing, and that the application was vexatious, and they therefore dismissed the application, with costs to be paid by the bankrupt. That the last-mentioned costs had not been paid, but that the bankrupt had been, since January 1832, confined in the King's Bench, and that said bankrupt was not in a situation to pay such costs, but, notwithstanding, had repeatedly and vexatiously made applications to the Court, with no other view, as deponent believed, than to put the petitioner and Mr. *Fisher* to needless and unnecessary expense. That on the 9th August 1834, the petition of appeal came on to be heard before the Lord Chancellor, but was dismissed with costs. That the costs had been taxed by the Clerks in Court of Chancery, but they were of opinion, that they had no power to tax the costs of the special case, or of the several motions, as the order of the Lord Chancellor dismissing the case gave them no power so to do; but deponent was advised and believed that the solicitor of the bankrupt ought to have drawn up the Order to include the taxation of the last-mentioned costs, if it were his lordship's intention to have so ordered, which it was not.

By an affidavit sworn by the bankrupt's solicitor, it appeared that, upon his attending to tax the costs before the Master, the petitioner's solicitor objected to the costs which had been incurred in this Court for settling the special case, and also the costs of the several motions, being taxed by the Master, no order had been made by this Court that they should form part of the costs of the appeal. That on the 5th December 1833, the counsel for the bankrupt attended

1834.

Ex parte
HAWLEY.

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—
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HAWLEY.

before the Chief Judge to settle the special case, and his Honor then suggested, that the costs of the settling the same should be considered part of the costs of the appeal, and that the brief was so indorsed.

ERSKINE, C. J.—Upon the former occasion I intimated my opinion that these costs were part of the costs of appeal.

Mr. *Swanston* and Mr. *Bagshaw*. These costs are manifestly so, and ought to have been provided for, when the appeal was disposed of. This Court has long since made its final order, and cannot now go into the question of costs. If it had not done so, the costs of preparing the special case are so manifestly part of the costs incurred in the appeal itself, that this Court could not, in any circumstances, deal with them: they must be determined on in the Court to which the appeal is made.

ERSKINE, C. J.—An order was made on the 19th April, that the special case should be set down for hearing before the Lord Chancellor within a week. It was however, in fact, set down at that moment. But if it had appeared that it had been set down subsequent to the notice of motion, and though prior to the hearing, the Court would have awarded the party the costs of that motion then; but the costs were reserved; and the case was set down only the day before the motion was heard. I think the bankrupt is, therefore, entitled to those costs. I should have thought that the costs of settling the special case ought to have formed part of the costs of appeal, and should, consequently, have been awarded

awarded against the petitioner, and have been taxed within the general order. If the taxing officer of the Court of Chancery has thought otherwise, this Court is bound to assist the party by sending their intimation to the officer that such costs ought to form a part of the costs of appeal, and should be taxed as such.

1834.

 Ex parte
HAWLEY.

Sir J. CROSS.—I should have thought that as soon as the special case was determined on, the case, with all the costs dependent thereon, was out of the reach of this Court. There is somewhat of an anomaly in this species of appeal. The act gives no power to the appellants judge to award costs of the special case; whence it seems that the Court still holds jurisdiction over the petition, although it has gone to an appeal, and though it would be still pending in another Court.

Sir G. ROSE—If the costs in this case had been to be taxed in this Court, instead of in the Master's office, we should certainly have intimated to our officer that the costs in question were the costs of the appeal. The only mode in which we can set it right is, by giving an intimation of our opinion to the Chancellor's officer.

The Order was, that the costs of and incidental to the special case, and the costs of all applications as to it, which were not already disposed of, should be paid to the bankrupt, after setting off the costs which he had been ordered to pay (a).

(a) A doubt having arisen in one stage of this case, as to the practice of setting down a special case before the Lord Chancellor, and of the mode

1834.

Ex parte
HAWLEY.

that act was constituted, the practice was thus stated by Mr. Barber, Registrar, viz.—The party must present a short petition of appeal at the Secretary of Bankrupts' Office, merely stating that a special case has been approved and certified by the Judge of the Court of Review, and praying the Lord Chancellor to appoint a time to hear it.

1835.

January 19.

Petition presented to the Lord Chancellor before 1 & 2 W. 4. c. 66., must be transferred by the Lord Chancellor to the Court of Review before that Court can hear it.

In the matter of STOKES.

THIS was an application to set down before this Court a petition presented to the Lord Chancellor before the Court Act came into operation.

The Court said that it was first necessary that an order should be obtained from the Lord Chancellor to transfer it to this Court.

Lord Chancellor.

Same day.

The Lord Chancellor's jurisdiction to annul a fiat still subsists.

In the matter of CHAMBERS.

IN this case Lord LYNTHURST said, that he saw no reason to depart from Lord Brougham's determination in *re Nokes* (a), and in *Ex parte Keys, in the matter of Terry* (b), that the jurisdiction of annulling a fiat was not taken away from the Lord Chancellor by the 1 & 2 Will. 4. c. 56.

(a) 1 Mont. & Ayr. 472. (b) 3 Des. & Chit. 263; 1 Mont. & A. 226.

Ex parte MYERS.—In the matter of **SUDELL.**

1835.

January 22.

THIS was a motion for the usual four-day order towards commitment for non-obedience to an order for the production of papers. The certificate of the Deputy Registrar, as to the non-obedience to the order, was produced, but it was dated the day anterior to the motion.

Order for four-day order, towards commitment, must be prayed by petition not motion, and certificate of Registrar of non-conformity, should be dated the very day of the application for the short order.

Mr. Koe, in support of the motion.

The COURT said, that the certificate ought to be dated the very day on which the application was made. The application too being towards commitment, must be moved on petition, and not on a mere motion paper.

This day a short petition was presented, and the certificate dated this day was produced; whereupon the Court

January 23.

Granted the Order.

Ex parte Messrs. SMITH, PAYNE, and SMITH.—In the matter of **WILLIAM MANNING, FREDERICK MANNING, and JOHN LAVICOUNT ANDERDON.**

1834.

December 13.

ON the 5th September 1831, the commission issued, and *Reid, Dixon, and Wrangham*, were chosen as-

M. and A., partners, were consignees of a West India

estate, and in that character became creditors to the estate. By deed long prior to the bankruptcy, the estate was conveyed to trustees, *M.* being one of them, on trust to apply the proceeds to certain purposes, one of which was to pay off the debt due to *M. and A.* *M. and A.* assign their debt to *S. & Co.* *M. and A.* become bankrupt; but, prior thereto, they receive ten hogsheads of sugar, which remain in the docks, earmarked in their name, at the time of the bankruptcy. Shortly after the bankruptcy 74 hogsheads arrive, consigned by the bill of lading to the bankrupts, which are received by the assignees, who also take the other ten hogsheads.

Held, that the sugars came to the hands of *M. and A.* clothed with trusts to pay the proceeds to *M.* as trustee, and were not in the reputed ownership of *M. and A.*, but must be applied to pay off the debt assigned to *S. & Co.*, and in discharge of the other trusts of the deed; *M.* as trustee being affected with notice to *M. and A.* of the assignment of their debt.

Held, also, a case within principle of *Ex parte Waring*, 14 Ves.

1834.

Ex parte
SMITH
and others.

signees. By a deed of November 1774, *John Estridge* conveyed his four plantations in the island of St. Kitt's, and other hereditaments in the island, "to the use and intent that the several persons named in the indenture of release should receive thereout several annuities, amounting together to 1300*l.* sterling per annum, for their respective lives, with the usual powers of entry and distress for recovering the same, when in arrear; and subject thereto to the use of two trustees for a term of 200 years, upon trust for securing the raising and payment of the said annuities, and the costs and expenses attending the same; and, subject to this term, to the use of two other trustees for a term of 300 years, to commence from the determination of the former term, upon trusts to be declared concerning the same, by an indenture of even date with the said indenture of release; and subject thereto, to the use of *Estridge*, his heirs and assigns, for ever." The above annuities were further secured by the joint and several covenants and bonds of *Estridge* and *William Manning* deceased, as *Estridge's* surety. By another deed of November 1774, it was declared, that the trustees of the term of 300 years should stand possessed of the same, upon trusts to indemnify *William Manning*, his heirs, executors, and administrators, from any loss which he or they might otherwise sustain in consequence of his having entered into the above-mentioned covenants and bonds. *Estridge* afterwards made his will in 1775, and appointed the said *Thomas Thomas*, *William Wharton*, *John Peachey*, *John Willett*, and *William Manning*, executors. But the trusts of the will were said not to be important. The testator died in September 1778, leaving *Susanna Estridge*, his widow,

John, his eldest son, and *Mary* and *Aretas Estridge*, his only children by a deceased wife, and two other sons, *Joseph* and *Edward Estridge*, his only children by *Susanna Estridge*. All the children had attained 21. On the death of the testator, *Thomas Thomas*, *William Wharton*, *John Peachey*, and *William Manning*, four of the trustees and executors, took upon themselves the execution of the will. The first three, viz. *Thomas Thomas*, *William Wharton*, and *John Peachey*, proved the will in St. Christopher's; and *William Manning* in the Prerogative Court of Canterbury, but *John Willett* renounced. In execution of the trusts, the four acting trustees took possession of and managed the real estates in St. Christopher's. Several changes in the persons filling the office of trustees took place, and ultimately the trusts devolved on *William Manning*, the son, and bankrupt, *Thomas Pitt*, and *Jedediah Kerie*. During the latter part of the life of *John Estridge* (the father), *William Manning* (the father), who was a merchant in London, was his merchant and consignee of the produce of the estates in St. Christopher's; and after *John Estridge's* death, *William Manning* (the father), and subsequently the bankrupt *William Manning*, and their partners, became the merchants and consignees of the trustees of *John Estridge's* will. At the time of his death *John Estridge* (the father) was indebted to various persons to a considerable amount, which his personal estate was insufficient to discharge; and, amongst other debts, a sum of 5179*l.* was owing by him to *William Manning* (the father), for advances made by him, some of which had been made in respect of the annuities secured by the deed of 1774. Having exhausted the personal estate of the said testator, (ex-

1834.

Ex parte
SMITH
and others.

1834.

Ex parte
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clusive of that which was attached to the plantations in St. Christopher's) in paying the expenses and debts, and a large sum yet remaining due, the trustees and executors applied the net proceeds of the real estates, after satisfying the annuities secured by the deed of 1774, towards the discharge of the testator's debts remaining unpaid; but, up to the year 1785, nothing had become available for the legatees under the will, and the debt to *William Manning* (the father), and a bond debt of 2500*l.* remained unpaid; and, besides these sums, the trustees became indebted to their merchants (the bankrupt, *William Manning*, and his partners,) in the sum of 8000*l.* and upwards, for advances made by them on account of the estates. Prior to this time the testator's daughter, *Mary Estridge*, had married Dr. *England*, and he had become entitled to the legacy of 10,000*l.* bequeathed to her by the will of her father; and Dr. *England* having called upon the trustees to discharge the same, they proposed to execute a mortgage to him of the testator's estates in St. Christopher's, for securing the same; and by deed of July, 1795, they conveyed to him all the plantations before mentioned (and the slaves and stock thereon), subject to such of the annuities secured by the deed of 1774 as were then subsisting, and to the several terms of years thereby limited, and to the security and indemnity of *William Manning* (the father), and to the payment of the sums of 5179*l.* and 2000*l.* and interest, and to an annuity of 500*l.* secured to the testator's widow, *Susanna Estridge*, by the settlement made on her marriage, and her said legacy of 1000*l.*; and also subject to the payment to the bankrupt, *William Manning*, and his partners, of 8000*l.* and upwards then owing to them, and of all such

other sums of money as should thereafter become due to them from the trust estates for monies advanced or to be advanced by them, over and above the clear yearly produce of such trust estates, in order to keep up the estates and the several yearly payments necessary to be made under the deed of 1774, and the will, with interest for such advances, and subject to redemption on payment of the legacy of 10,000*l.* and interest. In 1797, the above-mentioned bond debt of 2500*l.* still remained unpaid, and no part of the legacy of 1000*l.* bequeathed to the testator's widow had been discharged; and upon the application of the parties entitled to the same, the bankrupt, *William Manning*, and the three other trustees, by deed of 1797, conveyed the several plantations before-mentioned, but not the chattels of a personal nature belonging thereto, to two trustees in fee, subject to the trusts of the deed of 1774, by way of mortgage, for securing the payment of the two sums of 2500*l.* and 1000*l.* and interest: and the bankrupt *William Manning*, and his then co-trustees, declared, that, subject to the trusts of the deed of 1774, they would hold the personal chattels belonging to the plantations in trust for the parties entitled to the said sums and interest.

In the clause of the will of *Estridge* (the father), by which legacies are directed to be raised for the testator's children by his then wife, no provision is made in the event of there being two such children, and of both being sons; and the event having happened, doubts arose as to the legacies to which these sons would be entitled; and, to obviate these doubts, the trustees propose that they should be considered as entitled to 18,000*l.* in equal shares, and this was as-

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sented to by the two sons, *Edward* and *Joseph*, who were entitled to the legacy, and by *Aretas Estridge*, who was entitled to two of the estates, (the Brambles and Church or Lower Estate,) a devisee under his father's will, and to an annuity of 500*l.* per annum, charged upon the other two estates (the Hill and Hutchinson's Estates) by the will of his brother *John Estridge* then deceased, and also by the widow of the same *John Estridge*, who was entitled to two annuities of 500*l.* per annum each, charged by him upon the same estates; but the daughter of *John Estridge* (the son), who was entitled as devisee in his will to the same estates last-mentioned, was a minor, and consequently was not a party to the arrangement. Notwithstanding this, however, the trustees of the will of *John Estridge* (the father) agreed to secure the payment of 9000*l.* to *Edward Estridge*, and a similar sum to *Joseph Estridge*; and by a deed of December 1798, they conveyed all the plantations before-mentioned, but not the chattels of a personal nature, unto *Edward Estridge* the son, his heirs and assigns, subject to the annuities created by the deed of 1774, and the indemnity given to the said *William Manning* (the father), and the said bond debt of 2500*l.*, and to the annuity of 500*l.* charged on some part thereof in favour of the wife of *John Estridge* (the father), and subject to the payment to the bankrupt, *William Manning*, and his partners, of all sums of money which should thereafter become due to them from the said trust estates for money advanced beyond the yearly produce thereof, with interest for the same respectively, and subject also to the said mortgaged debts of 10,000*l.* and 1000*l.* secured by the deed of 1795 and of 1797, by way of mortgage for securing the

payment of the said *Edward Estridge* of the sum of 9000*l.* and interest; and by the deed of 1798, they conveyed the same estates to *Joseph Estridge*, in like manner for securing to him the further sum of 9000*l.* and interest. The estates still continued in the possession and under the management of the bankrupt, *William Manning*, *Thomas Pitt*, and *Jedediah Kerie*, (as trustees of the will of *John Estridge* the father), and they consigned the produce to the bankrupt, *William Manning*, and his partners, who paid the annuities secured by the deed of 1774. In this manner the affairs of the estates were conducted until the year 1815, when a suit was instituted in the Court of Chancery in England, praying that an account might be taken of what was due to the several incumbrances, and that what should be found due should be raised by a sale. At the time 11,000*l.*, or thereabouts, was due to the bankrupt, *William Manning*, and his partners, for money advanced by them above the produce of the estates, in order to keep up the estates and the several payments necessary to be made under the deed of 1774, and the will of *Estridge* (the father); but the above-mentioned bond debt of 2500*l.*, and the sum of 5179*l.*, which was owing to the estate of *William Manning* (the father) had been wholly discharged. No sale was effected under the suit, but an arrangement was made, by which the bankrupt, *William Manning*, and his partners, engaged to pay certain arrears, amounting to nearly 500*l.*; and this having been done, a deed was executed in February 1818, whereby it was agreed that the crops of the estates should be consigned to the bankrupt, *William Manning*, and *John Lavicount Anderdon*, and that the net proceeds of such

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crops should be applied by them, first, in payment of the subsisting annuities secured by the deed of 1774; secondly, that they should retain interest on 13,377l. 8s. 10d., which was then due to them on account of the estates, and upon all other monies which they should advance in discharge of the rates and taxes upon the estates, and of the costs in managing the same, (including other sums therein directed to be expended in improving the same, and the expenses of the negroes and stock, and of the requisite supplies, and the costs of cultivation,) and likewise upon the usual commissions; thirdly, in case the said 13,377l. 8s. 10d., and such future advances and payments, should at any time exceed 15,000l. in the whole, then in satisfaction of so much as should be owing to Messrs. *Mannings* and *Anderdon*, over and above 15,000l.; fourthly, in payment rateably of the interest on the several mortgage debts of 10,000l., 1000l., 9000l. and 9000l., and of two several sums for the support of the infant children of *John Estridge*, who had become entitled to the equity of redemption in the several estates; and, in the fifth place, in payment of the principal of the debt which should be due for the time being to the bankrupts. And it was declared, that on the 20th June in every year, during the continuance of the agreement, the bankrupts should render their accounts to the persons therein named, and that such persons should examine, and, if approved of, allow such accounts to the persons therein named within six months. It was agreed that the arrangement effected by this deed should continue in force until the 30th April 1822, and that in the meantime no proceedings should be taken for enforcing payment of the mortgage debts of 10,000l., 1000l. 9000l.,

and 9000*l.*, or of the debt due to Messrs. *Manning* and *Anderdon*. In conformity with this arrangement the crops of the estates were consigned to the bankrupts, and the estates remained in the possession of the persons named in the deed of arrangement for that purpose, or of attornies appointed by the trustees, the bankrupt, *William Manning* (the son), *Thomas Pitt*, and *Jedediah Kerie*. By the terms of the deed this arrangement expired on the 30th April 1822, and after that day any of the parties were at liberty to take proceedings for enforcing their rights against the estates; but no proceedings had been taken, and the estates continued under the same management, in all respects, and the proceeds of the crops were regularly applied by the bankrupts in the same manner, until their bankruptcy, which occurred in September 1831. A considerable sum of money remained due to the bankrupts in 1823, after the expiration of the agreement of February 1818, but no mortgage had been executed for securing the repayment; and the bankrupts in that year made an arrangement for pecuniary accommodation by *John Proctor Anderdon* esq., and by the said *Samuel Smith* deceased, and the petitioners, and assigned to *James William Freshfield* and *John Beadnell*, amongst other debts, all the principal sums then owing or thenceforth to become due to them on the security of the deed of 1818, on the security of the plantations described in the same deed, and all lien and benefit of charge and other benefit to be derived from the same deed: to hold unto the said *James William Freshfield* and *John Beadnell*, their executors, administrators, and assigns, in trust, as well for indemnifying *John Proctor Anderdon* against any loss which

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he might sustain by reason of his having entered into several liabilities on account of the bankrupts, as also for securing to him all monies for the time being due to him by the bankrupts, and subject thereto: in trust for securing to the said *Samuel Smith* and the petitioners, the payment of all monies for the time being owing to them by the bankrupts. All the liabilities in respect of which *John Proctor Anderdon* was to be indemnified by the last deed were taken up by the bankrupts, and he afterwards, by a memorandum indorsed on the indenture, relinquished his security to *Samuel Smith* and the petitioners.

In 1829 the bankrupts called upon the trustees of *Estridge's* (the father's) will, to give them security for the debt then due to them, amounting to 11,500*l.*, and upon this occasion *Jedediah Kerie* expressed a desire to retire from the trusts of the will, and he accordingly executed a release of all the trust estate to the two continuing trustees, the bankrupt *William Manning*, and *Thomas Pitt*, and in compliance with the bankrupts' application, they, by indentures of April 1829, conveyed and assigned all the estates before-mentioned, and the slaves and stock belonging to the same, to *Charles Franks* and *James Whatman Bosanquet*, their heirs, executors, administrators and assigns, subject to such of the annuities created by the deed of 1774 as were then subsisting, and to the several terms of years thereby limited, and the security and indemnity thereby given to *Manning* (the father), his heirs, executors, administrators and assigns, in trust, nevertheless, for the bankrupt, and subject to redemption, on payment to that firm, by the trustees of *Estridge's* (the father's) will, of the sum of 11,500*l.* and interest. 'This mortgage

was deposited with *Samuel Smith* and the petitioners as further security, and was held by them at the date of the bankruptcy. In the following year the bankrupts conveyed another estate, called *Burkes*, in the island of St. Kitt's, to *Samuel Smith* and the petitioners, as a security for the balance of their banking account, by an indenture of May 1830; and by the same deed the bankrupts assigned the principal sum of 11,500*l.* secured to them by the indenture of April 1829, and the interest thereof, "and all powers and remedies, to them the said bankrupts, *William Manning, Frederick Manning* and *John Lavicount Anderdon*, and each and every of them, for recovering and enforcing the payment of the said debt or sum," unto the said *James William Freshfield* and *John Beadnell*, their executors, administrators and assigns, in trust for the partners composing the firm of *Smith, Payne* and *Smith*, subject to redemption on payment, by the bankrupts, to the partners composing the firm of *Smith, Payne* and *Smith*, within three months after notice for that purpose, of all monies owing by them to the firm of *Smith, Payne* and *Smith*, in respect of sums either then already paid, advanced, or lent, or thereafter to be paid, advanced, or lent unto or on account of them, with interest for the same. And by the same deed *Messrs. Mannings* and *Anderdon* appointed *Freshfield* and *Beadnell* their attornies, for the purpose of receiving and signing receipts for the debt or sum thereby assigned. In June 1830, *Samuel Smith* and the petitioners gave notice to *Franks* and *Bosanquet* of this assignment, who acknowledged the receipt of such notice in a letter as follows: "Gentlemen,—We beg to acknowledge the receipt of your letter of the 4th instant, apprising

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us that Messrs. *Manning* and *Anderdon* have assigned the mortgage for 11,500*l.* on the *Estridge* estate in St. Christopher's, to Messrs. *Smith, Payne* and *Smith*, and that we are therefore to hold that mortgage in trust for Messrs. *Smith, Payne* and *Smith*. We have no notice of any other claim on the mortgage. We are &c."

By an order of this Court, in June 1832, made on the petition of *Samuel Smith* and the petitioners, reciting the facts above-mentioned, it was declared that the petitioners were equitable mortgagees of such interest in the estates in the said petition mentioned, as the bankrupts had at the time of their bankruptcy, by virtue of the securities in the said petition also mentioned. The bankrupts stopped payment on the 30th June 1831, and on the 5th September following a commission of bankruptcy was issued against them. They were then indebted to *Samuel Smith* and the petitioners, and were still indebted to the petitioners, as survivors of *Samuel Smith*, in a sum exceeding the amount of their security; and a question arose, between *Samuel Smith* and the petitioners and the assignees, as to the right to two parcels of sugar, which arrived from the estates in question, under the following circumstances:—Ten hogsheads of sugar had arrived from the *Estridge* estates before the bankruptcy, and remained in the West India Docks in the names of the bankrupts, at the date of the bankruptcy. On the 10th September, after the bankruptcy, 74 hogsheads of sugar arrived from the same estates, shipped by the manager under the bills of lading, deliverable to the bankrupts, and these 74, as also the 10 hogsheads, so remaining in the docks, were taken possession of by

the assignees, who sold the same and retained the proceeds thereof. In November 1831, a half-yearly payment became due to two of the annuitants, under the deed of 1774, amounting to 250*l.*; and in May 1832, another half-yearly payment also became due, and the annuitants claimed to have the proceeds of the sugar in the hands of the assignees applied in payment of their annuities, there being no other available fund in England, and the assignees made the payment without prejudice; it being agreed, that if they were entitled to retain the sugar, as against *Samuel Smith* and the petitioners, and also the annuitants, they should be repaid out of the first proceeds of the estate. *Samuel Smith* and the petitioners claimed the said sugar of the assignees immediately upon the arrival of the last-mentioned 74 hogsheads, but the assignees refused to deliver the same. Afterwards the same were sold by consent of both parties, without prejudice to the claim of the petitioners, and the net proceeds, amounting to the sum of 1417*l.* 13*s.* was deposited to abide the event of the claim of the petitioners, but the sum of 500*l.* being the two quarters annuities due in May 1832, to Mr. *Hyde* and Mr. *Sandley*, the only surviving annuitants under the deed of 1774, had been paid thereout, subject to the rights of the parties. The sum remaining due to the petitioners, by virtue of the mortgage security, was 38,000*l.*, and upwards, for principal money, besides interest; and the 917*l.* 13*s.* the net produce of the said sugars, after payment of the annuities, still remained in the hands of the assignees. The petitioners prayed that the petitioners might be declared entitled to the two several parcels of 10 hogsheads and 74 hogsheads of sugar, and to the proceeds thereof, and that

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the 917*l.* 13*s.* might be paid to them, and that they might be at liberty, after deducting thereout the costs incurred by them in preparing for a reference which had been proposed, but was ultimately broken off, and of this application, to retain the balance thereof in part discharge of the debt so due to them by the bankrupts.

Mr. *Kindersley* and Mr. *G. Turner*, in support of the petition. The petitioners claim the proceeds of the sugar in question, on the grounds that those proceeds are applicable to the part discharge of the debt due by *Estridge's* estate to the bankrupts, and by them assigned to the petitioners. The debt being legally vested in them, they are entitled to receive all sums that must be applied in reduction of it. It is contended on the part of the assignees that the debt secured on *Estridge's* estate, though assigned to the petitioners, was not legally vested in them for want of some notice of the assignment; but we contend, that if notice was required all the notice was given of which the case was susceptible. From the nature of the transaction, it was difficult to say that there was a legal debtor. Messrs. *Manning* and *Anderdon* had acted as consignees of the estates which were in the possession of the trustees, and in the course of these transactions had made advances, from time to time, for the supply of the estates, and for payment of interest and annuities charged on the estate, and they were entitled, under the deed of 1818, to be repaid out of the estates, but there was no one personally liable. The recital in the deed of 1818 is as follows: "And whereas the sum of 13,377*l.* 8*s.* 10*d.* was due and owing to the said *William Manning*, *Frederick Manning*, and *John Lavicount Anderdon*, on

the 30th day of April last past, in respect of their advance on account of the said trust estates, late of the said *John Estridge*, the elder." It is this debt which was assigned to Messrs. *Smith*, *Payne* and *Smith*, and *Mr. Manning* was himself one of the trustees of the estate, and had notice, of course, of the assignment; and at that time no other notice could be given to any party. Although notice to one executor is not good against the other (a), because they are not liable for each other's acts, it is otherwise with trustees; and notice to one is manifestly notice to all, because all would be liable to the acts of any one of them. But Messrs. *Smith*, *Payne* and *Smith* did all in their power; for as soon as a mortgage was made to Messrs. *Franks* and *Bosanquet*, giving a legal interest to them in the estates, the petitioners gave notice of their interest in the debt. This being so, we contend that the debt was legally assigned to and vested in the petitioners at the date of the bankruptcy, and that the assignees having no interest in the debt, have no right to receive and retain sugars, the proceeds of which, when sold, were intended for and must operate in reduction of the debt so assigned to the petitioners. It cannot be contended that the sugar in question was in the order and disposition of the bankrupts as true owners; it was consigned to them as factors of the trustees for sale upon commission, according to the ordinary practice of merchants in that line of business, and the possession of the sugar did not raise a presumption that they were the owners, but quite the contrary. The 74 hogsheads of the sugar were not in the possession of the bankrupts at the

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(a) See *Hawkins v. Day*, Ambl. 162. S. P. and S. C. Dick, 155.

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time of the bankruptcy, but arrived after the bankruptcy, and were received by the assignees. These sugars were claimed by the petitioners as soon as they ascertained the fact of their arrival; so that they never were in possession of the bankrupts at all, certainly not at the time of the bankruptcy, nor with the consent of the owners. If the sugars would be retained by the assignees as being in the order and disposition of the bankrupts, the consequence would be, that they must be retained, not only against the petitioners, but against the trustees, and the produce would in that case not diminish the debt, and then it would be immaterial to the petitioners. The only loss would fall on the estate of *Estridge*, as to which the bankrupts were merely factors, Mr. *Manning* being also a trustee. It is submitted therefore that the assignees cannot hold the sugars as goods and chattels in the order and disposition of the bankrupts as against the trustees, except for the purpose of applying them to reduce the debt, and they cannot hold it for that purpose if the debt was already vested in the petitioners. In *Jones v. Gibbons* (a), and in many other cases (b), it is clear that a debt on mortgage may be transferred by mere deposit of the securities, without notice to the debtor. By the former order in this matter it was determined that the petitioners were equitable mortgagees of the interest of the bankrupts in the securities, that is to say, that they were equitable mortgagees of the debt, by the deposit of the mortgage of 1829, for the bankrupts had no other interest in the securities than the debt. The petitioners also had an assignment of

(a) 9 Vesey, 407.

(b) See Chit. Eq. Index tit. "Notice, I."

the debt, and Mr. *Manning* and Messrs. *Franks* and *Bosanquet* had due notice of this assignment. But we contend that apart from the question of notice, the Court having decided that they had a valid mortgage of the debt, Messrs. *Manning* and *Anderdon*, or their assignees, could not, without the consent of the petitioners, receive payment of a part of the debt so equitably assigned, nor hold against them the produce applicable to the reduction of that debt, and that there never was in fact any consent by them to Messrs. *Manning* and *Anderdon*, or the assignees so receiving or dealing with the debt, or any part of it. The 10 hogsheads arrived, it is true, before the bankruptcy, but they remained earmarked in the West India Docks, so that they were distinguishable from the general property of the bankrupts, and therefore capable of being followed, and separated from the bulk of their estate. They were consigned to the bankrupts not as true owners, but as consignees; they also received them as trustees, and were bound to devote them to the purposes of the deed, one of the trusts of which was to discharge the debt due to themselves as creditors to the amount of the debt assigned by them to the petitioners. By the transaction, therefore, they were bound, as trustees for the petitioners, to apply the 10 hogsheads to the diminution of the debt so assigned. This liability still exists on the part of the assignees, that parcel of the sugar being earmarked, and capable of separation from out of the bankrupts' estates. The 74 hogsheads never came to the hands of the bankrupts, the assignees received them, and they did so subject to all the equities attaching against the bankrupts; the assignees had no interest in the consign-

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ment except as trustees for the benefit of the cestui que trusts. These sugars are not to be likened to the rents and profits of an estate in equitable mortgage, but are part of the *corpus* of the estate itself; they were consigned for the purpose, amongst other things, of *Mannings* and *Anderdon* paying off their debt, of which debt the petitioners were the assignees, together with all the rights and remedies for the recovery of it. [Sir *G. Rose*. Could the petitioners have stopped these sugars in transitu?] Certainly they could, as between themselves and the bankrupt; and if a case had existed of their being about to receive those sugars, and intending to abscond, it is clear that a special injunction might have been obtained to have prevented them (a). Besides, to establish reputed ownership, it is manifest there must be actual possession, which could not for a moment be said to have existed as to the 74 hogsheads; and as to the 10 hogsheads, they were in the bankrupts' hands, as trustees only, and being earmarked, could not pass to the assignees as being the property, either actual or by reputation, of the bankrupts.

Mr. *Swanston* and Mr. *G. Richards*, for the assignees. The assignees in this case have a right to retain the proceeds in question on the following grounds. Messrs. *Smith* and Co. are declared by the order of the 28th June 1832, (and not before,) to be equitable mortgagees (b). In such character then they are entitled to claim. A mortgagee is not entitled to the rents and profits (whether in money or in kind,) from the

(a) See also *Hampton v. Hodges*, 8 Ves. 105, which was cited.

(b) See the report of that part of this case, 2 Dea. & Ch. 271.

mortgaged estate until he is in possession, or until he has given notice that the rents and profits should be paid to him, and not to the mortgagor, this being equivalent to possession; *Moss v. Gallimore* (a), *Mead v. Lord Orrery* (b). Messrs. *Smith* and Co. were only equitable mortgagees, and could not have taken possession, and had not given any such notice at the time when the sugars arrived. The first notice given by Messrs. *Smith* and Co. was the presenting the petition in bankruptcy, which was not filed until May 1832, and the sugars were received in 1831. In *Ex parte Bignold, in re Harvey* (c), the present Master of the Rolls (d), indeed, decided that an equitable mortgagee was entitled to the produce of the mortgaged estate from the time of presenting his petition: but in *Ex parte Alexander, in re Till* (e), Lord *Eldon* would not go so far, and held, that an equitable mortgagee was not entitled to the rents and profits previous to the sale (f). It is settled that a mortgagee having a legal title never could, in the Court of Chancery, make the mortgagor account for the rents for the time past, *Ex parte Wilson* (g); nor for the profits received by the mortgagor, and applied by him to his own use, *Coleman v. Duke of St. Alban's* (h).

The assignee of a legal mortgagee has the same rights as the original mortgagee, but could not stand

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(a) Douglas, 265.

(b) 3 Atk. 244.

(c) 2 G. & J. 273.

(d) Sir J. Leach.

(e) 2 G. & J. 275.

(f) In *Ex parte Bignold, ante*, 259, the Court of Review held the equitable mortgagee entitled only from the date of the order for sale, or from the time of his taking possession.

(g) 2 Ves. & B. 252; S. C. 1 Rose, 444.

(h) 3 Ves. 25; see also as to second mortgagee, *Burney v. Sewell*, 1 Jac. & W. 650.

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in a better situation with respect to his claim for retrospective rents. Messrs. *Smith* and Co. have only an equitable mortgage of the interest of the bankrupts. Can they have a better right than the transferee of a legal mortgage? If the mortgagee has not the legal estate, the Court of Chancery will appoint a receiver, *Coleman v. Duke of St. Alban's*(a), but will do no more; and it has been decided, that against a receiver appointed not for his benefit, a mortgagee of a term is not entitled to a retrospective account of rents and profits accrued before the expiration of the term; *Gresley v. Adderley*(b). Again, supposing even Messrs. *Smith* would have been entitled to the sugars if the bankruptcy had not happened, we contend that they were left in the order and disposition of the bankrupts, and therefore pass to the assignees. As to the 10 hogsheads, they were clearly in their actual possession at the time of the bankruptcy; and as to the 74 hogsheads, they were equally so from the first moment they were consigned to them from the estate; the carrier of them, by the well-known doctrine of law, being from that time the agent of the consignee; and possession by an agent being equivalent to possession by the principal(c).

Mr. *Kindersley*, in reply, was stopped by the Court.

ERSKINE, C. J.—I, for one, should be extremely sorry if, according to the strict interpretation of the 6 Geo. 4. c. 16. s. 72., we felt bound to decide that

(a) *Suprà*.

(b) 1 Swanst. 573.

(c) See *Haille v. Smith*, 1 Bos. & Pul. 563; *Dutton v. Solomonson*, 3 Bos. & P. 582.

the property in question is vested in and belongs to the assignees; because it is quite clear that the equity of the case is entirely the other way.

There is no question in dispute raised by the other parties interested in the property, but who are not before the Court. And the only doubt is, whether, as against them, we could, in their absence, make an *adverse* order for delivering up of the property in dispute to the petitioners.

The claim raised by this petition is to two parcels of sugar, consisting of 10 and 74 hogsheads of sugar; the former of which came to the hands of the bankrupts prior to their failure, and the latter to the hands of the assignees subsequently thereto. Both parcels are earmarked, and capable of being identified and separated from the rest of the bankrupts' assets. As to the 10 hogsheads, at the time of the bankruptcy that parcel was in the West India Docks thus earmarked in the name of the bankrupts. When there, whose property was that parcel? If it was the absolute property of the bankrupts, then, as a necessary consequence, it would belong to the assignees, by the operation of the bankrupt laws. But it was consigned to them not as beneficial owners, but as consignees of the estate, in the mercantile signification of that term: and they have possession, not as owners, for their own absolute individual benefit, but as consignees and factors, to dispose of the produce in a particular manner and for certain purposes, according to the trusts of the deeds of 1818 and 1829. But the assignees say, that although the bankrupts were not the real owners, yet they were entitled partially under that deed towards the reduction of their debt; and that to a certain

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extent there was no trust affecting the property, they being the legal creditors. But before the arrival of those sugars the debt due to the bankrupts was assigned by them to the petitioners, and a mortgage made of their interest in the estate. The parties then becoming interested were the petitioners, and the proceeds thereupon came to the hands of the bankrupts, as trustees merely; first, for the purpose of paying the annuities; and secondly, for the payment of the debt due to them. For the deed of 1818, though intended only to operate till 1822, was, up to the time of the bankruptcy, continued to be acted upon. If it were competent to the assignees to say, that although the bankrupts were trustees, yet that their creditors are entitled to the produce of these two parcels of sugars, inasmuch as the bankrupts were in the reputed ownership of them at the time of their bankruptcy, then this injustice would necessarily ensue, namely, that the estate would be damaged by its still remaining chargeable with the annuities and debts so assigned to the petitioners; and the petitioners would be damaged, because part of their debt would be taken away from them. But it is a doctrine well established, that reputed ownership cannot be had of property in the hands of factors or trustees as such. The bankrupts were factors and trustees, and one of the trusts which they were bound to execute was the payment of the interest of the debt assigned by them to the petitioners. This, I think, is the proper way of looking at the case as regards the 10 hogsheads, and *à fortiori* will these observations apply to the 74 hogsheads which never were in the actual custody of the bankrupts, but arrived after the bankruptcy, and were re-

ceived by the assignees. I am, therefore, satisfied that the assignees are not entitled to withhold this property, but that the petitioners are entitled to have the prayer of their petition granted.

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Sir J. Cross.—The petitioners in this case insist on a lien upon this sugar paramount to the apparent right of the assignees, arising from reputed ownership. It is unnecessary to go through all the facts contained in the petition, because the assignees, as respondents, insist on two objections of law to the granting of the petition. First, it is said that the petitioners were only equitable mortgagees, and are therefore only entitled to the produce of the estate from the date of the order declaring them to be so; and secondly, they rely upon the doctrine of reputed ownership. As to the first objection, it is a sufficient answer to say, that the petitioners were virtually in possession. *Manning*, the bankrupt, was a trustee under the deed of 1818; and by virtue of the assignment of the debt, he was trustee also for the petitioners; he, as such, had possession of the estate by the manager; and, therefore, the petitioners had an equitable possession at least very different from that of a mere mortgagee. As to the second objection, I conceive it unnecessary to do more than to repeat, that it has been long established, that if goods and chattels are in possession of a bankrupt for any specific purpose, or, in other words, in trust, they do not pass under the 72nd section of the Bankrupt Act. Here the bankrupts had the possession for the purposes of the deed of 1818; one of which was, the payment of the debt assigned to the petitioners. That trust must

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be performed, and I think the assignees have shown no title to defeat the petitioners' claim.

Sir G. ROSE.—I do not perceive that the assignees have offered any sufficient answer to the claim of the petitioners. The contract between all the parties is, that the produce of the estate, viz. the sugars in question, shall be applied towards the debt assigned to the petitioners. There is nothing in the deed excluding the power of such assignment; and such then being the trusts of the deed, the doctrine of *Ex parte Waring* (a), confirmed, as it has been by this Court in the cases of *Ex parte Copeland* (b) and *Ex parte Prescott* (c), is applicable to this case. Within that doctrine, if I am the assignee of a debt, and certain property is covenanted to be applied in discharge of it, without more, I am entitled to have that property so applied. That is just this case, and the trustees, as such, have a right to say, that the property so liable shall be disposed of in that way, and so the equities between the estate and the petitioners and the bankrupts must be worked out, preventing any circuitry of remedy. The question of order and disposition, or reputed ownership, is at once met by the answer, that it was in the hands of the bankrupts only as trustees. They were factors and consignees, and their duty was to have handed over the proceeds of the estate to *Manning*, as trustee, to be applied by him in discharge of the debt assigned to the petitioners. It cannot be said that *Manning*, as trustee, had not notice. *Manning* and *Anderdon* clearly had notice of the assign-

(a) 2 Glynn & J. 404; 2 Rose, 182; 19 Ves. 345.

(b) 3 Dea. & Ch. 199.

(c) 3 Dea. & Ch. 218.

ment, and that was ample notice to *Manning* alone, he standing in the double capacity (a). I am therefore of opinion that the proceeds of the sugars must be handed over to the petitioners.

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It was accordingly ordered as prayed.

(a) See ——— v. *Adams*, 1 *Younge*, 117.

Ex parte J. W. LIDDIARD and GEORGE W. SHERRIFF.

—In the matter of JAMES COWARD.

1835.

January 28.

THE petition in this case stated, that in August 1833, *Henry Coward* and *James Coward* and *Richard Moore* carried on the business of linen-draper in partnership, under the firm of *Cowards* and *Moore*. *Henry Coward*, during the period before mentioned, carried on the separate business of an upholsterer at Bath, in partnership with one *William Fear*, under the style and firm of *Fear & Co*. That on the 10th of August 1833, the partnership between *Henry Coward*, *James Coward*, and *Richard Moore* was dissolved, so far as concerned *Moore*, and a written agreement, dated 10th August 1833, was thereupon entered into between *Richard Moore* of the one part, and *Henry Coward* and *James Coward* of the other part, whereby it was agreed, amongst other things, that *Richard Moore* should receive and be paid the sum of 350*l.*, being the amount of capital brought into the concern by him, and which sum was in full discharge of *Moore's* share of the stock in the shop, and of all the profits arising

A partnership of A., B., and C. is dissolved, A. and B. agreeing to pay all the partnership debts. D., a creditor of the old firm, ignorant of the terms of the dissolution, applies for payment; and A. and B. by letter beg time, and ultimately D. draws a bill on A., B., and C., which A. and B. accept in the name of A., B., and C., but without C.'s authority. A. and B. also, by letter signed by them alone, promise payment of the bill. A. and B. became bankrupts; C. also became bankrupt. Held, under the circumstances, that D. might prove the amount of the bill against A. and B.'s estate.

that D. might prove the amount of the bill against A.

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from the partnership concern from its commencement, at the time and in the manner therein mentioned. And *Henry Coward* and *James Coward* did thereby agree to pay and discharge all debts due from the firm. Notice of the dissolution of the partnership of *Cowards* and *Moore* was published in the *London Gazette*. After the retirement of *Moore*, *Henry Coward* and *James Coward* continued to carry on the business of linen-drappers in copartnership together, under the style or firm of *Henry and James Coward*. The petitioners, at the time of the retirement of *Moore*, were creditors of the firm of *Coward* and *Moore* for the sum of 150*l.*, for goods sold and delivered to them a short time previously to such retirement. The petitioners, not having received payment of the debt of 150*l.*, their agent, in September 1833, applied to *Henry Coward* and *James Coward* for payment, and *Henry Coward* thereupon stated to the petitioner's agent, that he should be shortly in London and would then pay the debt to the petitioners. In September 1833 (the debt still remaining due) the petitioners drew a bill of exchange for 150*l.*, payable to their order one month after date, and directed it to Messrs. *Cowards* and *Moore*, which bill was forwarded by the petitioners to *Henry Coward* and *James Coward* for acceptance. The petitioners shortly afterwards received a letter from *Henry Coward* and *James Coward* only, respecting such bill of exchange, in the words following: — "Gentlemen, It would afford us much pleasure to have accepted your draft, but we do not see that we shall be enabled to protect it, unless it were made to become due in the middle of January next, and your drawing upon us at two months from to-day will much oblige, and have

our best thanks. We are your's, obediently, *H. and J. Coward.*" The petitioners consented to the alteration of the bill, by making it payable two months after date, and thereupon *Henry Coward* and *James Coward* accepted the same *in the name of the late firm of Cowards and Moore*; but the petitioners insisted that *Henry Coward* and *James Coward* having no authority to bind *Moore*, the acceptance of the bill did not bind him but bound *Henry Coward* and *James Coward* only. *Henry Coward* and *James Coward* having accepted the bill, returned it to the petitioners with a letter in the words following:—"Bath, November 20, 1823. Gentlemen, We feel greatly obliged by your kindness in acceding to our wish, and herewith we enclose you our acceptance payable on the 22d January 1834, when you may depend our giving it protection. We are, gentlemen, your obedient servants, *H. & J. Coward.*" On the 4th December 1833, a fiat in bankruptcy issued against *William Fear* and *Henry Coward* jointly as copartners. On the 11th of December a separate fiat issued against *James Coward*. On the 27th February last a fiat issued against *Richard Moore*. The stock and effects which belonged to the original firm of *Cowards* and *Moore* were taken by *Henry Coward* and *James Coward*, upon the retirement of *Moore* from the partnership, as before mentioned; and *George Gibson*, as the official assignee appointed under the fiat against *James Coward*, had taken possession of such part thereof as remained unsold at the time of the bankruptcy of *J. Coward*, which was since sold. By an order of this Court, dated 25 July 1834, upon petition in the matter of the bankruptcies of *W. Fear* and *Henry Coward*, and of *James Coward* and of *Richard Moore*, it was declared that all the stock,

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property, and effects of the said firm of *Cowards and Moore*, became and were the stock, property, and effects of the firm of *Henry Coward and James Coward*, except as to any stock debt or debts which were or was due or owing to the firm of *Cowards and Moore* on the 10th August 1833, and in respect of which debts no notice was given to the parties owing the same of the agreement of dissolution of 10th August 1833. And it was ordered that the joint estate of *W. Fear*, and *Henry Coward and James Coward*, and the separate estate of each of them, should be administered under the fiat issued against *Fear and Henry Coward*; and that all debts due and owing to the respective firms of *Cowards and Moore*, and *Henry and James Coward*, should be collected; and that the joint estates of the firms of *Cowards and Moore*, and *Henry and James Coward*, and the separate estate of *James Coward*, should be administered under the fiat issued against *James Coward*; and that the assignees of *James Coward* should be at liberty to use the names of the assignees of *Fear and Henry Coward*, and of *Moore*, in any suits or actions to be brought for the recovery of any outstanding debts due to the firms of *Cowards and Moore*, and *Henry and James Coward*; and that the separate estate of *Moore* should be administered under the separate fiat against him; and that distinct accounts should be kept of the joint estate and effects of the firm of *Henry and James Coward*, and of the separate estate of *James Coward*. The petitioners attended before Commissioner *Fonblanque*, and tendered a proof of their debt of 150*l.*, upon and by virtue of the acceptance and the before-mentioned letters of *Henry and James Coward*, against the joint estate of *Henry*

and *James Coward*, and claimed to rank *pari passu* with the creditors of the firm of *Henry and James Coward*, who had proved their debts under the fiat against *James Coward*; but the Commissioner refused to allow such proof. The petitioners therefore prayed liberty to prove their said debt of 150*l.* under the fiat against *James Coward*, against the joint estate of *Henry and James Coward*.

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Mr. *Burge*, and Mr. *Montagu*, for the petitioners. We now seek to prove the bill in question against the joint estate of *H. and J. Coward*. Prior to the bill being accepted, the partnership, as to *Moore*, was dissolved; and though the bill was, subsequently thereto, accepted for a debt due by the original partnership, yet as the agreement was that *H. and J. Coward* should pay all the debts, *Moore* cannot be held liable upon this bill, notwithstanding it was accepted in the joint names of the three partners.

Sir G. ROSK.—That conclusion would be obvious, provided the creditor acceded to the arrangement that the partnership debts should be paid by the continuing partners. But you must show us, by positive evidence, that the creditor did accede to it.

ERSKINE C. J.—You must show that you evinced an intention of accepting the two as your debtors, in lieu of the three.

Mr. *Burge*, and Mr. *Montagu*. There is no question that if at law we produced this acceptance, purporting to be by the three, and proved the facts dis-

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closed by our petition, we should be entitled to recover the amount in an action against the two *Cowards* only.

ERSKINE C. J.—Were the petitioners aware of the dissolution, and the terms of it, when they received the bill ?

Sir G. ROSE.—I think there is sufficient allegation in the petition to let in evidence of that fact.

Sir J. CROSS.—The petitioners hold the security for the debt of the three, which the two had agreed to pay : and it appears to me that the right to prove against the two on that security is clear.

Mr. *Burge*, and Mr. *Montagu*. In *Ex parte Freeman* (a) it was indeed held, where by deed the stock and effects of a partnership were assigned to the continuing partner, who covenanted to pay the joint debts, and the partners became bankrupt, that the joint creditors not having, previous to the bankruptcy, accepted the continuing partner as their sole debtor, had not an election to prove against the separate estate of the continuing partner. That decision has however been overruled upon appeal (b), and Lord *Eldon* has ever since repudiated the Vice-Chancellor's doctrine as reported. Mr. *Bell* too, while at the bar, frequently expressed the same opinion of that case ; so that it may now be taken as an established doctrine that the proof of acquiescence is not requisite. The act of a party under

(a) Buck, 471.

(b) Per Mr. *Montagu*, arg. in *Ex parte Fry*, 1 G. & J. 96 ; 1 Mont. & Gregg, 235, and notes (n) (d).

ignorance of his rights, is in very few cases held to be binding on him (a). In the present case the petitioners had a right to claim the payment of this debt against the two *Cowards*, or against all three. Having, in ignorance of these alternative remedies, accepted the security from the two as the security of the three, they have now a right, on coming to the knowledge of the circumstances, to avail themselves of their equity against either, and to prove against the two *Cowards* only, without proof of any agreement or assent on his part that he should do so. The maxim, also, *qui sentit commodum sentire debet et onus* is clearly applicable in this case.

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Mr. *Swanston*, for the assignees. If this bill had been the mere acceptance of the two, then no doubt could arise on the question, and the two would be alone liable, and the debt would be proveable under their joint commission. So, although the bill is accepted in the name of the three, if the petitioners could show that they had, in any way, assented to the arrangement between the partners upon the retirement of *Moore*, they would be entitled to prove against the two. But the cases on the subject have long established, that without such assent no right could exist; *Ex parte Fry* (b), *Ex parte Freeman* (c).

Sir J. CROSS.—Is not this in fact the acceptance of the two only? They had no authority from *Moore* to

(a) *Blennerhasset v. Day*, 2 Ball & B. 128; *Cholmondeley v. Clinton*, 2 Mer. 362.

(b) 1 Gl. & J. 96.

(c) *Buck*, 471.

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accept for him, and may not the addition of his name be therefore treated as mere surplusage?

Mr. *Swanston*. The whole question is, did the petitioners assent to the adoption of the two only as their debtors? It is not pretended that they did: the letters which they wrote in the transaction were addressed to the three partners, and throughout the transaction they have continued to look upon the three, and not on the two *Cowards* only, as their debtors. In fact, they could not have acquiesced in the arrangement, for they never knew of it till after the bankruptcy.

Sir G. ROSE.—Suppose an action were brought against the two, could they say it was not their acceptance, or that they were not liable in the teeth of their own agreement? And can there be any doubt in a Court of Equity such as this is?

ERSKINE, C. J.—How could they plead to the declaration, that the acceptance was not theirs, when the proof of their hand-writing would be sufficient to show the contrary? If they pleaded in abatement that another party was liable, would not a proof of the dissolution of the partnership, and the terms of it, be a sufficient answer?

Mr. *Swanston*. The question now before the Court is, as to the administration of the bankrupt's assets. The creditors of the two acquire rights under it, which can only be bound by some contract obligatory on the bankrupts before their bankruptcy. Here is no con-

tract between them and the petitioner that they alone shall be liable; and no contract could have existed, because one of the parties required to it, viz. the petitioners, were in perfect ignorance of the arrangement, and never in any manner acted on it. The mere legal operation of the bill is therefore alone to be looked to, and it is not sufficient that the petitioners should now for the first time acquiesce in the arrangement on the dissolution.

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Mr. Burge, in reply, was stopped by the Court.

ERSKINE, C. J.—There are two modes of viewing this case, in each of which the petitioners might be entitled to prove this debt against the joint estate of *H. and J. Coward* only. The debt for which the bill was given was originally contracted by the two *Cowards* and *Moore*, to which the three conjointly, and not the estate of two in bankruptcy, was liable; so that had it remained in that state, the proof could not be admitted against the two only. To entitle the creditors, therefore, to claim its payment, they must either proceed by virtue of their acquiescence in the arrangement to accept the two *Cowards* as their debtors in the place of the three former partners, which would raise a contract on sufficient consideration against the two; or, having accepted from the two a security to pay the debt of the three, they must proceed on that security alone. There is no doubt that the mere agreement between the partners, that the two should bear the burthen of the prior partnership debts, is not alone sufficient. An agreement and acquiescence on the part of the creditor

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is necessary to render the arrangement complete and binding between all parties.

First, then, the question is, whether there was any acquiescence on the part of the petitioners? If the case depended simply upon that, I should say the evidence is not sufficient to show any acquiescence; because, though the letter to the petitioners was only signed by *H. and J. Coward*, yet the letter written by the petitioners was addressed to the three partners, viz. *Cowards* and *Moore*; from which it is clear they do not intend to relinquish their claim against *Moore*.

But, secondly, let us look at the right to prove upon the security taken. The three partners being indebted to the petitioners, they applied to the two *Cowards* for payment, and drew a bill upon all three, which they forwarded to the two *Cowards* for acceptance. The two *Cowards* then write to request the bill may be drawn at a longer date, and that letter is signed by them only. This is acceded to, and the bill is then accepted by the two *Cowards* in the name of *Cowards* and *Moore*, and forwarded in a letter promising its due payment, signed by the two *Cowards* only. The legal effect of this transaction would be to make the two *Cowards* only jointly liable at law; and I see no reason why the same liability should not exist in bankruptcy. They had, it is clear, no right to use the name of *Moore*. The petitioners have, therefore, the option to treat it as the debt of three or of two; and the extension of time given to the two was quite a sufficient consideration whereon to ground a contract by those two alone for payment of the debt. They did so contract on their parts, both as regards the petitioners by their letters to them, and towards *Moore* by the terms

of the dissolution. There is no ground therefore for rejecting this proof.

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Sir J. Cross.—It must be admitted on all hands that the petitioners could have recovered on this bill against the two *Cowards* at law, the latter having no authority to use the name of *Moore*, and having undertaken with him to pay the debt. But it is said there is a sort of equity arising requiring us to reject the proof. How that equity is to be defined I cannot understand. I can see no principle of law or equity for resisting the demand.

Sir G. Rose.—The petitioners, at the time of the bankruptcy, held that which, though purporting to be an acceptance by the two *Cowards* and *Moore*, was in fact the acceptance of the two *Cowards* only, as they had no authority from *Moore*, and no right under the circumstances, either in law or in equity, to add his name to it. I am therefore at a loss to discover what there is to hinder the proof being made against the estate of the two *Cowards* only. On the dissolution, the agreement between the parties was, that the two should pay the prior partnership debts, and then they accept the bill. This, under the circumstances, raises a special assumpsit against them. The proof must be admitted.

The petition was therefore granted (a).

(a) The principle in this case was confirmed in *Ex parte Hicks*, in C. R. 25th November, 1835.

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Ex parte RICHARD DICKSON and THOMAS RICHARDSON, Assignees.—In the matter of **GEORGE HUTCHINSON, JOHN HUTCHINSON, HENRY HUTCHINSON, and THOMAS PLACE.** And in the matter of **ANTHONY HAVISIDE**, trading under the firm of **ANTHONY HAVISIDE & Co.**

January 24.

H. & P. drawers of a bill on and accepted by *P. & Co.* for 2000*l.*, indorse it to *A.* for his accommodation. *W. & Co.* discount it for *A.* together with another bill drawn by *A.* for 2000*l.* upon and accepted by *S. & Co.* *A. & H.* and *P. & S. & Co.* severally become bankrupts. *W. & Co.* receive dividends from *S. & Co.*'s estate 666*l.* 13*s.* 4*d.* on *S. & Co.*'s acceptance; also 750*l.* from *H. & P.*'s estate on the bill drawn by them. They also prove against *A.*'s estate for 3333*l.* 6*s.* 8*d.*, as the amount of *H. & P.*'s bill, and

balance of *A.*'s bill on *S. & Co.*, after deducting the 666*l.* 13*s.* 4*d.* received from *S. & Co.*, and receive 277*l.* 15*s.* 6½*d.* dividend thereon, 166*l.* 13*s.* 4*d.* being in respect of the proportion of proof on *H. & P.*'s bill. *P. & Co.* stopped payment, and under a composition deed, *W. & Co.* receive 1000*l.* in respect of *H. & P.*'s bill. Total in respect of *H. & P.*'s bill 1916*l.* 13*s.* 4*d.*, leaving balance 83*l.* 6*s.* 8*d.*

Semble, (*W. & Co.* claiming to have a right to retain *H. & P.*'s bill in order to work out their remedies against *A.* in respect of *A.*'s bill) that the assignees of *H. & P.*, although they tendered the balance 83*l.* 6*s.* 8*d.*, could not compel *W. & Co.* to deliver up *H. & P.*'s bill.

Quære, whether the Court has jurisdiction on a subject of litigated title such as this.

Held, that as *W. & Co.* were not bound to receive the 83*l.* 6*s.* 8*d.* the petition was premature at all events till the bill was fully paid off.

GEORGE, John, and Henry Hutchinson, and Thomas Place, carried on business at Stockton-upon-Tees as bankers, under the firm of *Hutchinsons and Place*. *Sir Peter Pole & Co.* carried on business in London as bankers. *Anthony Haviside* carried on business at Bucklersbury, in London, as a merchant, under the firm of *Anthony Haviside & Co.*, and at Stokesley, in Yorkshire, under the firm of *John Haviside and Son*, but he was the only person interested in the two firms. *Thomas Wilson, Fletcher Wilson, Gabriel Shaw, and Melvil Wilson*, carried on business in London, as merchants, under the firm of *Thomas Wilson & Co.* On the 1st November 1825, *Hutchinson and Place* drew a bill of exchange, dated the 1st November 1825, for 2000*l.*, payable two months after date to the order of *Thomas Cust*, the clerk of *Anthony Haviside*, at Stokesley, upon *Pole & Co.*, who accepted the same, and the bill of exchange

was delivered to *Anthony Haviside*, trading under the firm of *Anthony Haviside & Co.* From time to time *Haviside* applied to *Hutchinsons* and *Place* to make to him loans or advances, and accordingly *Hutchinson* and *Place* made such loans, and one of them was by delivering to him the bill of exchange in question. *Haviside* procured the bill to be discounted for him by *Wilson & Co.*, who thereby became the holders of it. *Wilson & Co.* also discounted for *Haviside* a bill for 2000*l.* dated 21 October 1825, drawn by him on the firm of Messrs. *Haviside & Co.* upon and accepted by Messrs. *Sykes & Co.* On the 19 January 1826, a commission issued against *Haviside* trading under the two firms, and *Helps*, *Cowper*, and *Balance* were chosen assignees, together with Mr. *Whitmore* the official assignee. On the 24 December 1825 a commission issued against *Hutchinson* and *Place*, and the petitioners and one *Thomas Stanwix*, since deceased, were chosen assignees. Before the bill drawn by *Hutchinson* and *Place* arrived at maturity, *Pole & Co.* stopped payment, and a deed of trust was afterwards executed for the benefit of their creditors, under which considerable payments had been made to their creditors, who by the deed relinquished all claim to interest on their debts. On the 30 December 1825, a commission issued against *Sykes & Co.* *Wilson & Co.* proved the bill drawn by Messrs. *Haviside & Co.*, and accepted by *Sykes & Co.*, dated 21 October 1825, under the commission against *Sykes & Co.*, and received a dividend in respect thereof, under that estate, of 6*s.* 8*d.* in the pound, amounting to 666*l.* 13*s.* 4*d.* *Wilson & Co.* proved the bill drawn by *Hutchinson* and *Place*, against *Hutchinson* and *Place's* estate, and received thereon dividends amounting to 7*s.* 6*d.* in the

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pound, being the sum of 750*l*. *Wilson & Co.* also proved, in manner hereinafter mentioned, 3333*l*. 6*s*. 8*d*., being the amount of the bill drawn by *Hutchinson and Place*, and the balance of the bill drawn by Messrs. *Haviside & Co.* and accepted by *Sykes & Co.*, after deducting 666*l*. 13*s*. 4*d*. against *Haviside & Co.*, and received thereon a dividend of 1*s*. 8*d*. in the pound, being the sum of 277*l*. 15*s*. 6½*d*. The following is a copy of the depositions of *Wilson & Co.*, under the commission against *Haviside*: "3333*l*. 6*s*. 8*d*. *Thomas Wilson* of Warnford Court, merchant, being sworn and examined the day and year, and at the place aforesaid, upon his oath saith, that *Anthony Haviside*, the person against whom this commission of bankruptcy is awarded and issued forth, was at the time of the suing forth of the said commission, and still is, justly and truly indebted to this deponent, and to *Gabriel Shaw, Melvil Wilson* and *Fletcher Wilson*, in the sum of 3333*l*. 6*s*. 8*d*., upon the balance of account for which said sum of 3333*l*. 6*s*. 8*d*. or any part thereof, this deponent hath not, nor hath either of his said partners, nor any person by their order or to this deponent's knowledge or belief, for their use, received any security or satisfaction whatsoever.

Note or Bill.	Date.	Drawn.	Acceptor.	Sum.	Payable to.	At what Date drawn.	Indorsers.
	1825.			£.			
Bill.	Nov. 1.	Hutchinson & Co	Pole & Co.	2000	Order of T. Cust.	Two months.	Hutchinson & Co. Bankrupt.
Do.	Oct. 21.	Bankrupt.	Sykes & Co.	2000	Order of Drawer.	Two months.	Bankrupt.

Thomas Wilson."

The proof as to 2000*l.* was made in respect of the bill so drawn by *Hutchinson* and *Place* upon and accepted by *Pole & Co.*, and 166*l.* 13*s.* 4*d.*, part of the dividend of 277*l.* 15*s.* 6½*d.*, was received in respect of such 2000*l.* *Wilson & Co.*, with the consent of the petitioners and the assignees of *Haviside*, accepted the terms of the trust deed of *Pole & Co.*, and executed the trust deed, and received under it, in respect of the bill drawn by *Hutchinson* and *Place*, from the estate of *Pole & Co.*, dividends amounting to 10*s.* in the pound, being the sum of 1000*l.* *Wilson & Co.* had by the means aforesaid received, in respect of the bill drawn by *Hutchinson* and *Place* on and accepted by *Pole & Co.*, the sum of 1916*l.* 13*s.* 4*d.*, and there remained due to them in respect of the bill 83*l.* 6*s.* 8*d.* and no more, as appears by the following account.

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Thomas Wilson & Co. with the assignees of *Hutchinsons* and *Place*, in respect of bill drawn by *Hutchinson & Co.* on *Pole & Co.*

Drs.				Crs.			
To dividend from Pole & Co. of 10 <i>s.</i>	£.	s.	d.	By our draft on Messrs. Pole & Co.....	£.	s.	d.
To ditto Hutchinsons 7 <i>s.</i> 6 <i>d.</i> ...	1000	0	0		2000	0	0
To ditto Havisides 1 <i>s.</i> 8 <i>d.</i> ...	750	0	0				
To balance.....	166	13	4		2000	0	0
	83	6	8	By balance due to Wilson & Co.	83	6	8
	2000	0	0				

Two further dividends had since been declared under the commission against *Haviside*, and a further dividend was in course of payment under the deed of trust. The petitioners had applied to *Wilson & Co.*, and had offered to pay to them the sum remaining due to them on the bill drawn by *Hutchinson* and *Place* on and accepted by *Pole & Co.*, on *Wilson & Co.* giving up the bill to the petitioners, and allowing the petitioners.

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the benefit of all further dividends to be received under the commission against *Havside* in respect of the last-mentioned bill, and of all future payments to be made under the deed of trust in respect of the same bill; but *Wilson & Co.* refused so to do, alleging that they are entitled to retain the bill drawn by *Hutchinson* and *Place* upon *Pole & Co.*, and to receive all dividends and payments in respect thereof until they had received the full amount, as well of that bill as of the other bill drawn by *Havside & Co.* upon and accepted by *Sykes & Co.* Upon the final balance of account agreed between *Hutchinson* and *Place*, and *Pole & Co.*, *Hutchinson* and *Place* were creditors upon *Pole & Co.* (after giving them credit in account for bills drawn by *Hutchinson* and *Place* upon *Pole & Co.*, and accepted by them to the amount of 30,000*l.* and upwards, none of which bills were paid by *Pole & Co.*.) in the sum of 9000*l.* and upwards.

The petitioners therefore prayed, that it might be referred to the Registrar to ascertain what remained due to *Wilson & Co.* in respect of the bill drawn by *Hutchinson* and *Place* upon *Pole & Co.*, and that upon payment by the petitioners to *Wilson & Co.* of the amount so found due to them in respect of the bill so drawn by *Hutchinson* and *Place*, the bill might be delivered to the petitioners, and that in that case the petitioners might be entitled to the dividends declared under the commission against *Havside*, and to all other dividends declared in respect of the bill.

Mr. *Montagu*, Mr. *Russell* and Mr. *Wilson*, in support of the petition. Upon the authority of the case of *Ex parte Barratt* (a), we are entitled to have the

(a) 1 Gl. & J. 227.

proof against *Hutchinson* and *Place's* estate expunged. The bill in question is paid in full, by the proof made against their estate and *Haviside's*, and under *Pole & Co.'s* trust deed, with the exception of about 83*l.* which we tender and are ready to pay to *Wilson & Co.*, and upon so doing we are entitled to an order that *Wilson & Co.* shall deliver up the bill to us. *Ex parte Barratt* (a) decides, that where a creditor proved in respect of several bills drawn by the bankrupt and discounted by the creditor, and one of them was subsequently paid, the proof of that bill must be expunged, and that such proof could not be sustained as a security for the payment of the other bills. In this case, as in *Ex parte Barratt*, the two bills now in the hands of *Wilson & Co.* are totally distinct from each other. To the one, for securing the payment of which the proof is now sought to be retained, *Hutchinson & Co.* are no parties, and in fact *Haviside* is the only party interested upon both. Supposing that the bill which is the subject of this petition had been paid before the bankruptcy, it cannot be doubted that *Wilson & Co.* could have had no right to retain it (b).

The assignees of *Haviside* did not appear by counsel, but had signed a consent that the bill should be given up to the petitioners, *Haviside* having received the bill from *Hutchinson* and *Place* without giving any consideration.

Mr. Burge, and Mr. Bethell, for the respondents, *Wilson & Co.* The Court has no jurisdiction to make this order. This is a mere question between two classes of creditors, and is a demand for money had and received by the one for the use of the other.

(a) 1 Gl. & J. 327.

(b) See 1 Mont. & Gregg. 138.

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The bills are altogether distinct from each other, the transaction on the one hand had no connection with that on the other, as far as *Hutchinson & Co.* are concerned. In *Ex parte Sammon* (a) it was held, that if bills amounting to 1320*l.* be delivered by the drawer to a creditor as collateral security for a debt of 4000*l.*, and the drawer and acceptor become bankrupt, but the estate of the acceptor prove solvent, the creditor is entitled to receive 20*s.* in the pound on the bills against the estate of the acceptor, and also prove the debt of 4000*l.* and receive dividends in liquidation of the remaining portion of his debt, under the commission against the drawer. So in this case, the respondents are entitled to prove and retain the bill. If the Court had jurisdiction, it would not exercise it to deprive the respondents of the benefit from a chance of the payment of interest on the bill in the event of there being any surplus.

Mr. Russell in reply. This petition is presented in the matter of both bankruptcies, and the subject is the equities arising between them; and that is quite sufficient to give this Court jurisdiction, at least the Court can restrain the receipt of any further dividends. As to the objection that the respondents may be entitled hereafter to interest in the event of a surplus, we will at once meet that by an offer to pay the interest due.

Sir J. Cross (b).—There is certainly some difficulty as to whether we have jurisdiction, on the one hand,

(a) 1 Dea. & Ch. 564.

(b) *Erskine*, C. J., from private reasons, declined giving any opinion.

and whether, if we have jurisdiction, we should now exercise it to the extent sought by the present petition. Upon the first point, however, the inclination of my opinion certainly is, that we have jurisdiction. The subject-matter of the petition arises between the assignees of *Hutchinson* and *Place*, on the one hand, and the creditors, *Wilson & Co.*, who have proved a debt upon the bill against this estate. The one party says, the bill is paid all but a portion, which they tender to the respondents, and claim then to have the bill delivered up as being paid in full; and the other party says, "No; true, with the balance now due, the bill is paid, but we are entitled to hold it as security for the full payment of another bill in our hands, drawn by *Havside* and accepted by *Sykes & Co.*" This seems to me to be a question within our jurisdiction. But even supposing that to be the case, are we, secondly, to exercise that jurisdiction? The first question to be asked is, whether the petitioners are aggrieved by the respondents prior to their coming into this Court? Certainly not; it is admitted there is still a balance of 83*l.* due upon the bill in dispute. The title of the assignees is not yet ripe, therefore; for until the bill is wholly paid, they have no right here. True, they offer to pay this balance, but the respondents are not bound to accept it, and we have no power to compel them to do so. There is no objection raised against the validity of the original proof upon the bill, and that proof must at least stand till the bill is wholly paid. Even supposing the case of *Ex parte Barratt* to be parallel in other respects, it cannot guide us upon the present occasion, because there, there was an actual wrong to be redressed; the bill was there ac-

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tually paid off, and that gave the assignees, under the circumstances of that case, a right to come into Court and demand that the debt should be expunged. Here, however, no injury is at present sustained. Upon these grounds, even ceding that we have jurisdiction, I think this petition must be dismissed.

Ex parte Bar-
ratt, 1 G. & J.
 327, confirmed.

Sir G. ROSE.—When a petition is presented in two bankruptcies, seeking the delivery up of a security in the hands of a creditor of both, and for the restraining payment of future dividends, and the creditor claims adversely a right to retain it as a subject of property, in order to work out other equities he may have beyond its immediate payment, it becomes very difficult to say, as between such parties, that this Court has jurisdiction. There can be no dispute about the correctness of the principle in *Ex parte Barratt*, that where one of a series of bills is paid off, that must be separated from the rest, and that it gives to the assignees a right to expunge the proof. But in that case no adverse ulterior right was set up by the creditor proving the bill. I should feel great difficulty in saying that we had jurisdiction. But supposing we have jurisdiction, are we to overlook the lien which *Wilson & Co.* claim to have? If bankruptcy had not intervened, or supposing even now an action of trover were brought to have this bill delivered up, supposing it to be a bit of mere waste paper, would not the action be at once met by the lien which *Wilson & Co.* might have, even to the extent of one farthing? The claim *Wilson & Co.* have against *Havside*, is not to be satisfied by the payment of interest merely. If, again, a bill in equity were filed, if it were stated on the answer that *Wilson*

& Co. claimed a lien on it for monies due upon it from other persons, would not that at once put an end to the suit? If it be looked at in bankruptcy simply, though the bill be paid, it is not a matter of right, but a mere question of expediency, whether the debt shall be expunged. That is a subject of discretion, to be exercised in particular cases, which, though it has almost become a general rule, is yet subject to many exceptions. The Court is not in the habit of entertaining this kind of question of equity between two sets of assignees, or between them and a creditor upon the contested right to property. I think there are quite enough of equities on behalf of the respondents to justify us in making this an exception to the rule.

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Expunging a debt not a matter of right, but of expediency; and discretionary.

The petition was therefore dismissed with costs.



Ex parte THOMAS ROGERS.—In the matter of WILLIAM ROGERS.

THIS was a motion on behalf of the original petitioning creditor. The petitioner, on this application, prayed that he might be at liberty to present a petition to this Court, in the name of *George Moger* and *John Smith*, for an order that the fiat might be proceeded in, and for costs out of the estate of and incident to such petition, and of and incident to a peti-

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The petitioning creditor issued the fiat on a debt of 700*l.*, but the greater part being contracted during the bankrupt's minority, and not for necessities, the debt was reduced below 100*l.*, and was, therefore, in-

sufficient to support the fiat. But the petitioning creditor had also accepted bills for the accommodation of the bankrupt, which having been indorsed by the bankrupt to A., A. proved them under the fiat. The petitioning creditor subsequently paid these bills:—Held that, on indemnifying A., and on presenting a petition in the name of A. for that purpose, the petitioning creditor was entitled, under the 6 G. 4. c. 16. s. 18 and 52, as a surety paying the debt, to substitute the debt so proved on the bills by A. for the original petitioning creditor's debt, so as to support the fiat, notwithstanding the words "any other creditor," in the 18th section.

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tion presented by the present applicant in December last, praying that the fiat might be proceeded in, notwithstanding the insufficiency of the petitioning creditor's debt, and also of a special case submitted by him for the approbation of this Court, he undertaking to indemnify *Moger* and *Smith* against all costs incident to presenting such petition in their name.

By an affidavit filed in support of the motion, it appeared that the fiat was issued the 18th April 1834, upon an act of bankruptcy committed on the 15th November 1833. The bankrupt had not yet surrendered, but absconded to the Brazils, having, shortly before, assigned all his effects to *G. Reynolds*, for his sole benefit, in fraud of his other creditors. At the time of the bankruptcy, the bankrupt was indebted to his brother, the present applicant, in the sum of 700*l.* and upwards, and the latter attended the meeting for choice of assignees, and several adjournments, in order to prove; but the commissioners subsequently reduced his debt to 79*l.* 3*s.*, the other items whereby the sum of 700*l.* was made up having been contracted during the bankrupt's minority, and in the course of his trade, and not for necessaries, so that the original debt became insufficient to support the fiat. Previous, however, to issuing the fiat, the petitioning creditor had, for the accommodation of the bankrupt, accepted four bills of exchange, drawn by the bankrupt, and which were indorsed by the bankrupt to *Reynolds*, and by him to other persons; to which bills the petitioning creditor was liable, at the time of the bankruptcy, as accommodation acceptor. One of these bills the petitioning creditor had paid since the bankruptcy, which, though above 100*l.*, having never been proved before

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he took it up, could nor, he was advised, be a sufficient petitioning creditor's debt (a); but as to the three others, *George Moger*, for himself and partner *Smith*, as indorsees, proved a debt of 445*l.* 7*s.* 6*d.* under the fiat. *Moger* and *Smith* subsequently sued *Thomas Rogers*, the applicant, who paid them the amount of two of such bills, viz. the sum of 333*l.* 15*s.*, and interest and costs. These bills having been accepted by him for the accommodation of the bankrupt, *Thomas Rogers* now sought to substitute the 333*l.* 15*s.* debt for the original petitioning creditor's debt, which had, as before mentioned, become insufficient.

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Mr. *Swanston* and Mr. *G. L. Russell*, in support of the motion. The Commissioners, in consequence of the reduction of the original debt, are unwilling to proceed to the choice of assignees, or further to prosecute this fiat, unless this Court will substitute the debt paid to *Moger* and *Smith*, for the original petitioning creditor's debt, under the 18th section. That section provides, "that if after adjudication the debt or debts of the petitioning creditor or creditors, or any of them, be found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor or creditors, having proved any debt or debts sufficient to support a commission, provided such debt or debts has or have been incurred not anterior to the debt or debts of the petitioning creditor or creditors, to order the said commission to be proceeded in, and it shall by such order be deemed valid." The

(a) See per Lord *Eldon*, in *Copis v. Middleton*, Turn. & Russ. 230; and 6 G. 4. c. 16. s. 18.

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debt so proved by *Moger* and *Smith*, and since paid by the petitioning creditor, is sufficient, on substitution, to support the fiat, within the terms of the 18th section. The 52nd section provides, "that any person who at the issuing the commission shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt, (although he may have paid the same after the commission issued,) if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said commission which such creditor possessed or would be entitled to in respect of such proof; or if the creditor shall not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail as aforesaid, after an act of bankruptcy committed by such bankrupt; provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed." By that section, the party now applying having been, at the issuing of the fiat, liable for the debt due to *Moger* and *Smith*, which debt they proved, and which the present applicant has since paid in full, as surety, is entitled to stand in the place of *Moger* and *Smith*, in the words of the act, "as to the dividends, and all other rights under the said com-

mission, which such creditor possessed, or would be entitled to, in respect of such proof."

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Sir G. ROSE.—The debt has, by the payment, become extinguished, and, if so, *Moger and Smith* are not creditors now, and the case is not, therefore, within the general equity, nor within the provisions of the 52nd and 18th sections. In *Copis v. Middleton (a)*, it was held, that if two persons join in a bond, one as principal, and the other as surety, if the surety pay the bond, he has no claim against the principal on the bond, but is merely entitled as a simple-contract creditor. In this case, therefore, is not *Thomas Rogers* a creditor now, in respect of a sum of money paid for the bankrupt's use since the bankruptcy, without any right to stand in the place of *Moger and Smith*?

Mr. Swanston and Mr. G. L. Russell. It is by the force and operation of the statute that the right to receive the dividends, on the proof made by the principal creditor, remains, so that the debt is clearly not extinguished altogether. By force of the same section, all other rights which the original creditor had are retained to the surety. The original creditor could, it is clear, upon the original petitioning creditor's debt proving insufficient, have applied to substitute his debt as the petitioning creditor's debt, under the 18th section. This was one of the "other rights" which the original creditor had, and what is there to exclude those rights which the 18th section gives from the operation of the 52nd section? The term "all other

(a) Turn. & Russ. 224.

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rights," in the 52nd section, must be taken to imply all those rights which have for their object the payment of the debt claimed under the commission. The right of substitution, given by the 18th section, is manifestly one step towards the object of payment. It cannot, therefore, be urged that as *Moger* and *Smith* are no longer creditors, the present application cannot be entertained; for the act itself considers the principal creditor, who is paid off, still a creditor, for such purposes as those which we now ask. Our right of substitution being clear, it is manifest the Court will empower us to use *Moger* and *Smith's* name, upon proper indemnity. But without assigning any plausible reason for the contrary, *Moger* and *Smith* obstinately refuse us permission so to do.

Mr. *Bethell*, on behalf of *Moger* and *Smith*, opposed the motion. *Thomas Rogers* cannot be regarded as a surety within the 52nd section; neither, if he could, would it be possible that he, having been the original petitioning creditor, whose debt turns out to be insufficient, should become entitled to substitute, within the meaning of the 18th section. When the present applicant, who was the accommodation acceptor, paid the bills, he obtained a right of action against the bankrupt, not upon the bills themselves, but merely upon an implied assumpsit, within the principle of *Copis v. Middleton* (a), as mentioned by Sir G. *Rose*. By the payment of the bill, the debt became utterly extinguished. The bill thereupon gets back to the drawer, and, to use the words of Lord *Eldon*, the debt is gone (b). The debt now sought to be substituted,

(a) *Suprà*.

(b) *Copis v. Middleton*, Turn. & R. 229.

arises, therefore, upon an implied assumpsit subsequent to the fiat. But the debt required by the 18th section must have all the requisites of a petitioning creditor's debt; it must have been a debt legal in its nature, and due at the issuing of the fiat, and not merely arising subsequently, from the mere equity of having paid a debt due by the bankrupt to another person. It is clear that *Moger* and *Smith*, being no longer creditors, could not apply. If they presented this petition, it would, of itself, be suicidal. To what purpose then is the use of their name, even if they were willing to lend it?

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Sir JOHN CROSS.—The argument is not that *Moger* and *Smith* should apply, but that, by force of the statute, the applicant, *Thomas Rogers*, is entitled to stand in their place; and if the objection, that *Moger* and *Smith* are no longer creditors, is to have any weight, the 52nd section becomes wholly useless. But it appears to me, that the statute intended to give to the surety paying the debt, all such rights as the principal creditor had before he was paid. Had not then *Moger* and *Smith* a right to substitute their debt before it was paid? and has not the present applicant consequently such right now?

Mr. *Bethell*. The right of substitution is not a right under the commission, but something independent and antecedent to it. The party now applying is the mere assignee of the debt, and the claim he now has against the bankrupt is a mere equitable claim as such assignee, and cannot, as an equitable debt, be sufficient to support the commission. The use of *Moger*

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and *Smith's* name would be of no avail; for, as the statute must be construed strictly, they are not creditors, and the application under the 18th section being required to be by creditors, they could not, having been paid, make any such application. Neither can any debt of *Thomas Rogers* be substituted. He was the original petitioning creditor; and it is by reason of his debt proving insufficient that substitution is required. The 18th section gives power to the Lord Chancellor to substitute "upon the application of any other creditor having proved" &c.; that is, other than the former petitioning creditor. The section clearly precludes the original petitioning creditor from having any right to substitute, and it is, in general, a fit punishment upon him that he should be so excluded. There is, therefore, no ground for the present motion.

Mr. Swanston, in reply. The statute is an answer to all the objections contended for on the other side. So far from the right of substitution now sought for being independent of, or antecedent to the fiat, it is in order to support the fiat that the right is insisted on, and therefore it is peculiarly an application under the fiat, and dependent thereon. If the objections now urged against the right of substitution be good for any thing, they must be good to the full extent; and they would preclude the present claimant from any of "the other rights" mentioned in the 52nd section; and, amongst them, from the right to receive dividends; but that cannot for a moment be contended for. The debt on the bills cannot be said to have become utterly extinct, since, on going in under the 52nd section, he

must exhibit those bills, to entitle him to the benefit of the proof by *Moger* and *Smith*. Nor can *Thomas Rogers* be said to be a mere assignee of a debt; for having paid the debt as surety, this statute gives him all the rights, and places him in the exact position of a legal creditor.

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ERSKINE, C. J.—I confess that nothing which has been said in support of the motion, has sufficed to remove from my mind the impression I have throughout entertained against this application. But as one of the judges entertains a different opinion, I must take time to consider the case more deliberately, before I give any decided opinion upon it.

Sir G. ROSE.—I shall be glad to avail myself of the opportunity afforded us, to reconsider this question in all its bearings. My strong opinion, however, at present is, that the 52nd section was never intended to give to a petitioner, circumstanced as the present one is, the right of substitution. And I may go further and say, that it never was intended to place a surety in a situation to substitute for the original petitioning creditor's debt; but its benefits were confined to the rights incident to proof, by means of the receipt of dividends and such like. If *Moger* and Co. withdrew their opposition, how could any rights they have been made available to Mr. *Swanston's* client? Their debt, by payment, has become extinct. They could not apply to substitute; neither can *Thomas Rogers* succeed in a similar application, using their names. The right to substitute is, moreover, given to any creditor other than the former petitioning creditor, whose debt

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fails. My present impression therefore is, that in no way of shaping the question can this application succeed ; and that the debt now due to *Thomas Rogers* is merely a debt for so much money lent and advanced subsequent to the bankruptcy.

The case stood over for judgment.

March 14.

ERSKINE, C. J.—This was an application on behalf of Mr. *Swanston's* client, in effect praying liberty to substitute a debt paid since the fiat, in lieu of the original petitioning creditor's debt, on which the fiat issued ; and that *Moger* and *Smith*, on being indemnified, might be compelled to allow the use of their names for that purpose, so that the fiat might be proceeded with. The application was made, in the first instance, in December last. But no notice having been served on *Moger* and *Smith*, which was considered necessary, the case stood over in order that they might be served.

Now the facts are these ; the present applicant was the original petitioning creditor under this fiat ; but on investigation, his debt was cut down below the amount of 100*l.*, and therefore it became insufficient to sustain the fiat. But it appears that at the date of the fiat he was also under accommodation acceptances for the bankrupt, to the amount of 460*l.* and upwards : —that in respect of them he was, in fact, a surety for the bankrupt. *Moger* and *Smith* proved the amount of two of these bills, upwards of 330*l.* ; and *Thomas Rogers* being sued upon these bills at law, subsequently to the bankruptcy, paid these two bills. Upon this state of facts it is argued, that his situation became

that of surety who had paid the debt of the bankrupt, and had therefore become entitled, under the 52nd section, to stand possessed of all the rights which *Moger* and *Smith* had at that time. And, certainly, as *Moger* and *Smith* had proved their debt under the fiat, *Thomas Rogers* was within the strict interpretation of the 52nd section,—a surety who had paid the debt,—and he became entitled to all the rights acquired by *Moger* and *Smith*. The difficulty we felt on the hearing of this motion was, that this was not, under all its circumstances, a case within the contemplation of the legislature; because the object of the legislature seems mainly to have been to remedy the inconvenience in which a surety was placed previous to the 49 Geo. 3. c. 121. s. 8., viz. that he could avail himself of no remedies under the commission, although the principal creditor had proved. That, however, was remedied in regard to the receipt of dividends, by the above-mentioned acts. But the 6 Geo. 4. c. 16. s. 52., in addition to the right to dividends, extends the benefit to sureties of “all other rights” which the principal creditor had. Those words are, for the first time, added by this latter statute. Those words appeared to me to extend only to all the rights which an ordinary creditor had of voting in the choice of assignees, and signing the certificate and such like; and it did not appear to me to be intended to apply to such a case as the present, or to give the right to substitute a debt within the 18th section, because the object of the legislature, in that section, appeared to be to exclude the original petitioning creditor from the right of substitution, by using the words, “any other creditor.” But it is very difficult to get over the general words

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"all other rights," in the 52nd section. Undoubtedly one of those rights which *Moger* and Co. had under that section, was to come in and substitute their debt as petitioning creditors, and *Thomas Rogers*, standing in their place, has a right to come in on petition to substitute, under the 18th section; *Moger* and Co. however refuse to accede to the use of their names; but they show no ground to warrant their resistance. Although we could not directly make an order upon them for that purpose, it will, no doubt, (having decided the main point, namely, the petitioner's right to substitute,) be sufficient to declare that they ought to concur in such steps as are necessary for the purpose.

Sir J. CROSS.—The question is, whether a right can exist to apply to support a fiat, by a debt paid by a surety under the 52d section. I think the general words, "all other rights," entitled the petitioner to that which he now seeks. Under that section the debt is transferred to all intents and purposes to the surety paying it off, with all its rights, remedies, and liabilities; and it seems to be beyond a doubt, that if he had not been also the original petitioning creditor, no objection could have been made. But the 18th section certainly raises some difficulty, from its adoption of the words, "any other creditor;" and those words seem *prima facie* to exclude this petitioner himself. It must not be lost sight of, however, that he does not now seek to substitute in his individual capacity. He applies for liberty to do so *in autre droit*, just the same as if he came as executor to any other creditor who had proved; in which case it could not for a moment be contended, that any difficulty would stand in his way.

Why should he not be allowed to substitute in a case so analogous as the present is? The wording, however, of the 18th section, seems adverse to the claim by a petitioning creditor for leave to substitute. But that difficulty is met by his asking leave to use the names of *Mager* and *Smith*. It has been the constant every-day practice to order that a party shall be at liberty to use the name of others, especially in the case of assignees. So in the case of the assignment of a bond, the Court will direct the obligees to permit their names to be used by the plaintiff, the assignee, in putting the bond in suit; *Jackson v. Rudford* (a). And such is the present application; and it seems clear that the Court would grant such application. This, however, *Mager* and *Smith* oppose, though apparently without any reason, except that their counsel say the Court has no authority. This seems to me to be a most unrighteous opposition, and I am glad to find the Court are now inclined to discountenance it. It appears to me, upon the whole, that the petitioner is entitled to have this fiat supported, either in his own name, or, which would be the more formal mode, in the names of *Mager* and *Smith*. But being entitled, it is for the petitioner to decide in which way he will enforce that right.

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Sir G. ROSE.—This is quite a novel case. It is one of singular importance, and must become a precedent in future cases of this nature. I certainly entertained strong impressions adverse to this application at the time it was argued; but I now find that the very difficulties I originally felt in acceding to it, have become

(a) 4 Price, 273.

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the grounds on which I am now inclined to grant it. The principles which were opposed to it were: 1st, that the application to substitute could not, from the words of the 18th section, be made by the original petitioning creditor; 2dly, that this Court had no jurisdiction to compel the use of *Moger* and *Smith's* name; and 3dly, that there was no debt existing as due to *Moger* and *Smith*, upon which, if the use of their name was given, the fiat could be supported in their name.

As to the first objection, I thought that the petitioning creditor was the last person to be favoured upon an application under the 8th section, to substitute another debt in lieu of that on which he originally issued the fiat. But, circumstanced as he now is, I do not think that the Court should on that ground (as the statute does not expressly, but merely impliedly, except him,) refuse his application; especially as the consequences of his laches will fall sufficiently heavy upon him, in the shape of the costs of all the steps necessary for the substitution. Having got rid of that difficulty, the next question is, is any person, situated as the petitioner is, (putting out of the case the circumstance of his having been petitioning creditor,) entitled to sustain the commission, by a debt of this nature? It must be conceded that there is no legal debt due to him, and, standing alone, he would not be a sufficient creditor for that purpose. But it is a principle of equity, that a surety paying a debt shall be entitled to all the rights and remedies which the principal creditor had, so as to work out his indemnity by payment. He is entitled to every remedy within the reach of the creditor, and may compel the creditor to render all those rights and

remedies available. If the surety had not paid the debt even, but upon a bill filed against the principal creditor he offered to pay it, and stated the fact of the debtor having gone abroad, and that without the relief of equity, he could have no other remedy for his debt; he might compel the principal creditor even to sue out a fiat, so as to work out his payment and indemnity. To that it might be objected, that being paid, *Moger* and *Smith* in this case could not be petitioning creditors, because of the impossibility of making the usual affidavit of debt. But the Court, upon this state of circumstances, could dispense with the necessity of the affidavit. It might be said that the surety's right against *Moger* and *Smith* would not be a right under the commission, but that seems to me to be hypercritical, and that it would clearly fall within the equitable jurisdiction of the Court of Bankruptcy, and, in the fair intendment of the clause, would be one of the rights mentioned in s. 52. As to the difficulty that *Moger & Co.* have no existing debt to support the fiat, it will be proper to look at their position at the time of suing out the fiat, rather than to the present moment. The order must be qualified in this respect, so that it must not be supposed we have passed over any of the difficulties of the case unguardedly; and it will be found we shall be well able to maintain our order with this qualification.

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Mr. *Swanston* then applied that the petitioning creditor might have the costs out of the estate. In *Ex* debt by any other creditor, it appears that the original debt was proved under a mistake in law, and was reduced on legal grounds, and without fraud on the part of the original petitioning creditor, the costs shall come out of the estate. But *secus* if the application to substitute is by the original petitioning creditor, though he comes to substitute even under such circumstances in *autre droit*.

If on an application to substitute a petitioning creditor's

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parte Cousins (a), the Vice-Chancellor laid down the following rule as to the liability of the original petitioning creditor for costs upon substitution of the debt, viz. "that if upon the evidence it appear that the commission failed through the mistake of law or of fact by the petitioning creditor, then the costs should be paid out of the estate. But if proved to have been in consequence of the misconduct or fraud of the petitioning creditor, then he shall pay the costs occasioned by such fraud, and of the consequent application to the Court." Here, there is clearly no fraud, and the mistake of the petitioner was a mistake in law.

Sir J. CROSS.—The case you allude to is a very different one from the present. There the application was by a creditor for the benefit of the estate, here it is a dispute between the surety and the creditor.

ERSKINE, C. J.—It is clear the petitioning creditor should pay the costs. The case to which you allude is that of another creditor petitioning to substitute, and the question was, whether he should have his costs out of the estate or from the original petitioning creditor. In the case before us, the petitioning creditor is forced to come here by his own circumstances. He must certainly bear the burthen, as well as the advantage of this application.

The Order was as follows:—This Court doth declare, that the said *Thomas Rogers* is entitled to stand in the place of the said *George Moger* and *John Smith*, in respect of the debts due on

(a) 2 Gl. & J. 270.

the bills of exchange, dated the 11th of January and 1st of November 1853, and proved by them under the said fiat as to the dividends on such proof or proofs; and all other rights under the fiat in respect of the said debts respectively; and for that purpose, if necessary, to use the names of the said *George Moger* and *John Smith* in any application or proceeding to support such fiat, upon giving to the said *George Moger* and *John Smith* a good and sufficient indemnity against all loss, costs, charges, damages or expenses they may incur, sustain, or be put unto in respect thereof. The indemnity, to be settled by Mr. *Gregg*, the Deputy Registrar, and all the costs to be paid by *Thomas Rogers*.

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The COURT also directed a short petition to be presented by the petitioner, *Thomas Rogers*, in the name of *Moger* and *Smith*, after the indemnity had been given, and directed the order upon that to be,

That the debt of *Thomas Rogers* is insufficient to support the fiat, and that the debt of *Moger* and *Smith* is an existent debt, within the true intent and meaning of the statute; and then the order for substitution in the usual terms.



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Ex parte GROOM.—In the matter of CHAMBERS.

March 9.

The Court has no jurisdiction to control the discretion of a Commissioner as to what documentary evidence he shall require to be produced to prove an act of bankruptcy. But the Court intimated its opinion that a letter written by the bankrupt's wife to a third party, in whose possession it remained, though it could not in any way afford direct evidence of the act of bankruptcy, (unless it was also proved that she was authorized by her husband to write it as his agent,) she not being examinable as a witness upon that point, yet might be ordered to be produced, to be used only as a clue to the procurement of other evidence as to the act of bankruptcy.

THIS was a petition appealing from the decision of a Commissioner, and it prayed that a party of the name of *White* might be ordered to produce, for the inspection of the assignees, a letter addressed to him by the wife of the bankrupt, and which the assignees supposed contained some clue to evidence of the act of bankruptcy. Mr. *White* was examined on summons as a witness before the Commissioner, and the Commissioner decided that he could not be compelled to produce it; nor could the assignees examine him as to his information and belief upon any matter supposed to be contained in the letter.

Mr. *G. Richards* and Mr. *Arnold*, for the petitioner.

—We do not press the present application in order that we may use the letter in question as direct evidence as to the act of bankruptcy, which we could not do for many reasons (*a*), but because it may lead us to the discovery of other evidence concerning it. By 6 *Geo.* 4. c. 16. s. 33. the Commissioners are empowered to examine any person whom they “believe capable of giving information concerning the person, trade, dealings, or estate of such bankrupt, or concerning any act or acts of bankruptcy committed by him, or any information material to the full disclosure of the dealings of the bankrupt; and it shall be lawful for the said Commissioners to require such person to produce any

(*a*) See *Barron v. Grillard*, 3 V. & B. 166; *Young v. Voules*, 13 Ves. 140; *Rutter v. Baldwin*, 1 Eq. Ab. 226; *Cole v. Gray*, 2 Vern. 79; *Ex parte James*, 1 P. W. 611.

books, papers, deeds, writings, or other documents in his custody or power, which may appear to the Commissioners necessary to the verification of the depositions of such person, or to the full disclosure of any of the matters which the Commissioners are authorized to inquire into." So that there is a clear jurisdiction in the Commissioner to examine Mr. *White* himself, and likewise to compel him to produce the letter, even by the very words of the statute.

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Sir G. ROSE.—What jurisdiction have we over the Commissioner in the exercise of that discretion with which the law has armed him? Or, if we had power to compel the examination, and the witness still declined to answer, could we; if the Commissioner declined doing so, compel the commitment of the witness by the Commissioner? It is very certain we could not ourselves commit him. And I know of no case in which this or any other Court has ever interfered with the discretion of the Commissioner as to the mode of examining a witness.

Mr. *Richards*, and Mr. *Arnold*. Suppose the letter in question clearly related to the estate of the bankrupt, and the Commissioner had, upon a ground totally different from the present, refused to order its production, this Court would then control the Commissioner's discretion. In *Ex parte Solarte* (a) the Court felt no difficulty in going into the question of whether the Commissioner could examine the executor of a debtor to the bankrupt's estate. And in *Ex parte Cossens* (b)

(a) 1 Dea. & Ch. 311. S.C. Mont. 495.

(b) Buck, 531.

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the Lord Chancellor entertained a question on the power of Commissioners to examine. In *Ex parte Vogel*(a) it was held, that Commissioners, incidentally to their power under ss. 33 and 34, might examine witnesses respecting other individuals, through whom they might be likely to obtain information of the person, trade, dealings, estate, &c. of the bankrupt; and that therefore where a witness was asked questions as to when and where he last saw the bankrupt's wife, such questions were material, and that the Commissioners were justified in committing for giving unsatisfactory answers concerning them. There the questions were held proper, as laying the foundation of other inquiries which the Commissioners might make, touching the estate of the bankrupt; and in the present case we seek the production of this letter, as laying the foundation for further inquiry as to the act of bankruptcy, which, though not from the bankrupt's wife (b), we are entitled to inquire of from Mr. *White* or any other person. If, as in *Ex parte Vogel*, questions whether the witness had seen the bankrupt's wife, were such as to authorize the Commissioners to commit for insufficient answering, because such questions might lead to other evidence as to the effects of the bankrupt,—and if (and of which there is no doubt) the witness could be examined as to whether he had or had not received certain verbal information upon such and such links in the chain of evidence touching the act of bankruptcy, surely he may and ought to be examined as to whether he has not a written statement containing such information in his possession, and should be compelled to produce it.

(a) 2 Barn. & Ald. 219.

(b) *Ex parte James*, 1 P. W. 611.

Mr. *White* appeared in person, and stated his willingness to obey any order the Court might make.

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ERSKINE, C. J.—The Commissioner seems to have treated this purely as a question of evidence; and if he has in fact done so, he has properly rejected it. For if the letter were to be produced as evidence of the act of bankruptcy, as the wife herself could not be examined upon that subject (a), it could not be used as evidence. The letter therefore either contains evidence of such subjects, upon which the wife could be examined, or on which she could not; if the latter, that itself is a sufficient objection to the production; and if the former, much better evidence is within the reach of the assignees than the mere production of this document; for the wife might be examined *vivâ voce* upon the subject. The letter, however, seems to relate only to matter as to which the wife could not be examined, viz. the act of bankruptcy; and whatever she may have written upon that subject, unless the assignees can show she was authorized to write it as the agent of her husband, they can neither call for it, nor yet use it, if they had it, as evidence. The petitioners however do not, they say, seek to use it as evidence, but only as the means of obtaining, and as a clue to, further information. In this point of view I certainly think they are entitled under the 33d section to have it produced. It might corroborate other evidence capable of being adduced, in consequence of its production. It is, in my opinion, in this way of looking at the question, perfectly competent to the Commissioner to compel its pro-

(a) *Supra*.

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duction. But, at the same time, it is a matter resting entirely in his discretion.

Sir JOHN CROSS concurred.

Sir G. ROSE.—We have no jurisdiction to control the Commissioner in the exercise of his discretion. If a Commissioner refers to us for our opinion upon the point, and states his willingness to adopt it, it would be quite a different question. All we can do at present is, to intimate our opinion to him, and he may adopt it or not, as he thinks fit; but we have no jurisdiction by adverse order over the subject-matter. My opinion as to the propriety of the production of this letter accords with that of the other judges; for I view the examination under the fiat as a kind of bill of discovery *vivâ voce*; and if a bill of discovery were filed against Mr. *White* by the assignees, interrogating as to the receipt and contents of the letter, stating its probable materiality towards further disclosure, in no way could Mr. *White* avoid setting forth the contents of the letter. It must, however, be distinctly understood, that our opinion is, that this letter cannot be made use of in any other way than as a stepping-stone to further and ulterior inquiry.

Upon this intimation Mr. *White* gave the letter into the assignees' hands.



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Ex parte FLORANCE YOUNG and GEORGE GIBSON,
(Official Assignee.)—In the matter of **WILLIAM PRIOR.**

THIS petition stated that the bankrupt, *William Prior*, by his bond, dated the 28th July 1823, became bound unto *Thomas Rowley*, since deceased, in the penal sum of 12,000*l.*, subject to a condition for making void the bond on payment by *Prior*, his heirs, executors, or administrators, to *Rowley*, his executors, administrators, or assigns, of 6000*l.* on the 28th day of July 1830, with interest thereon in the meantime, at the rate of 5*l.* per cent. per annum. *Rowley* by his will, dated the 17th December 1823, amongst other things, gave and bequeathed as follows :—

Also I give and bequeath unto my son-in-law, Mr. *William Prior*, the husband of my daughter *Jane*, the sum of 1000*l.* of like lawful money, subject nevertheless to the provisions or conditions herein by me declared of and concerning the same. And I do hereby also give and direct, that they my said trustees, &c. shall and do lay out and invest, in their names, the sum of 3500*l.*, either in the public funds or on freehold or other real security or securities, at interest, and shall and do pay the interest or dividends thereof, as and when the same shall from time to time become due and payable, unto my daughter *Elizabeth*, the wife of the said *Samuel Pratt*, or otherwise permit and authorize her to receive the same for and during the term of her natural life, to the intent that the same shall be and remain as a separate personal and unalienable provision

should be made up, the 1069*l.* should accumulate ; after which the assignees entitled to the interest for the bankrupt's life.

May 5 & 12.

By will the father-in-law of the bankrupt gave 4000*l.* in trust for his daughter for life, to her separate use, then to the bankrupt for life, and then to the issue of the marriage. The will, reciting that the bankrupt was indebted to the testator 6000*l.* on bond, declared that so much of the debt on the bond as remained unpaid in the testator's life-time should go in redemption and satisfaction of the above bequest of 4000*l.* Prior to the bankruptcy, and subsequently, by means of dividends from his estate, 1069*l.*, part of the 6000*l.* bond debt, was paid off and invested in the funds. On petition of the assignees, claiming to be entitled to the interest of the 1069*l.*, the wife being dead, held (Sir J Cross diss.) that, until the 4000*l.* were declared

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for her my said daughter *Elizabeth*; and I declare that the same, or any part thereof, shall not be subject or liable to the control, debts, engagements, or incumbrances of her said present or any future husband, but shall be and remain to and for her sole and separate use. And that the receipt or receipts, acts or deeds of my said daughter *Elizabeth*, shall from time to time, notwithstanding her coverture, be in all respects valid and effectual; and that such receipt or receipts shall be good and sufficient discharge and discharges to my said trustees and executors, or other the person or persons paying the said interest or dividends, for so much thereof as in such receipt or receipts shall be acknowledged or expressed to be received: and from and after the decease of my said daughter *Elizabeth*, leaving her said husband, the said *Samuel Pratt*, her surviving, then upon trust to pay the interest or dividends of the said sum of 3500*l.* unto the said *Samuel Pratt* or his assigns, or otherwise to authorize or permit him to receive and enjoy the same for his own use and benefit, for and during his natural life; and from and after the decease of the survivors of them, my said daughter *Elizabeth* and her said husband, then my said trustees shall stand possessed of the said principal sum of 3500*l.*, and the stock, funds, or securities, in or upon which the same shall be invested, and the interest and dividends thereof, upon trust for all and every the child or children of my said daughter *Elizabeth*, who, being a son or sons, shall live to attain the age of twenty-one years, or being a daughter or daughters, shall live to attain that age, or be married, (with the consent of my said trustees or executors, or the survivor or survivors of them,

or other, the trustee or trustees for the time being,) equally to be divided between or amongst such children respectively, if more than one, share and share alike ; and if there should be but one of such children, then the whole thereof to such one. Provided always, and I do hereby expressly declare and direct, that if my said daughter *Elizabeth* shall depart this life without leaving any child, or who being a son shall live to attain the age of twenty-one years, or being a daughter shall live to attain the age of twenty-one years, or be married, with such consent as aforesaid, then and in such case, and from and after the decease of her husband, the said *Samuel Pratt*, the said sum of 3500*l.*, or the stock, funds, or securities, wherein or whereon the same shall be invested, shall go and be paid, transferred, or assigned unto or for the benefit of such of any other children as shall be then living, and the issue of such of them as shall be then dead, equally to be divided between them, if more than one, share and share alike, and if but one, the whole thereof to such one, but nevertheless upon and subject to the trusts, declarations, and directions in and by this my will declared or contained of and concerning the original legacies or bequests hereby respectively given or made to or in favour of such other children or child, and their issue, and so that the issue of such of them, my said other children, as shall be then dead, shall have and be entitled to only such part or parts thereof as his, her, or their parent or parents would have taken or been entitled to if living ; and I do hereby also will and direct, that they my said trustees, or the survivors &c., shall and do, in like manner, lay out and invest in their names, the sum of 3500*l.*, either in the public funds or on freehold or

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other real security or securities, at interest, for the benefit of each of my said daughters, *Jane*, the wife of said *William Prior*, *Harriott*, the wife of the said *William Cook*, and *Maria*, the wife of the said *William Draper*, and shall and do stand and be possessed of and interested in the said three several sums of 3500*l.*, and the stocks &c., and the interest and dividends thereof, and pay, apply, and dispose of the same respectively upon such and the like trusts, and subject to the like directions and in the same manner, in all respects, for the separate use and benefit of my said three daughters respectively, during their lives, and at their decease for their several husbands and children, as I have hereinbefore expressed and declared or directed concerning the said legacies so as aforesaid given by me, and bequeathed to or in trust for my said daughter *Elizabeth Pratt*, and her husband and children, together also with the like proviso or benefit of accruer or survivorship as to each of the said three last-mentioned sums of 3500*l.*, in the event of the decease of my said daughters, as provided with respect to *Elizabeth Pratt's* 3500*l.*, and subject nevertheless to the said legacies or sums of 3500*l.* hereby intended or provided for my said daughters *Jane Prior* and *Harriott Cook* respectively, to such further conditions and declarations as are hereinafter mentioned and contained with regard thereto. And whereas my son-in-law, *William Prior*, stands indebted to me in the sum of 6000*l.* for monies lent and advanced to him on his bond, bearing date on or about the 28th July 1823, conditioned for the payment of the same sum to me, my executors, administrators, or assigns, in seven years from the date thereof, with interest in the meantime, at and after the rate of

5l. per cent. per annum, by yearly payments: and my said son-in-law, Mr. *Cook*, is also indebted to me in the sum of 2583l. 12s. 6d. for monies lent and advanced to him by me on the security of his bond, bearing date on or about the 29th day of May 1818, conditioned for the payment of the same sum (as above). Now my will is, and I do hereby declare, that if the said principal sums so due from the said *William Prior* and *William Cook* respectively, and the interest thereof, shall not be paid off or discharged in my life-time, the same sums and interest respectively, or such part thereof as shall remain due and unpaid on the said bonds respectively, shall be accounted for and go or be taken in part or on the whole, so far as the same will extend, in redemption and satisfaction as well of the aforesaid several legacies or sums of 1000l. hereinbefore given and bequeathed to my said last-named sons-in-law respectively, as also of the said several sums of 3500l. hereinbefore bequeathed to or in trust for my said daughters *Jane Prior* and *Harriott Cook* respectively, and their respective issues, and of such further and other sums or provisions as by survivorship or otherwise they may respectively become entitled to under this my will, in proportion and according to the sums which may at the time of my decease be or become due to my said executors for principal and interest on the said bonds respectively; it being my desire and intention that the direction hereinbefore contained shall not exonerate my said sons-in-law, *William Prior* and *William Cook*, from their liability to pay and discharge to my said trustees and executors the whole of the said sums of 6000l. and 2582l. 12s. 6d., and the interest thereon, when and as the same respectively shall become

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due, according to the purport and effect of the said bonds or obligations, and the conditions of the same respectively; and that if the same several sums and interest shall not be duly paid at the respective times and in the manner in the said bonds respectively mentioned, then and in such case that my said executors and trustees shall have and pursue all such lawful remedies and means for recovering the same principal sums and interest, and all arrears thereof, or all such part or parts thereof as may from time to time remain due and unpaid, as they in their discretion shall see fit; but if the monies which may be or become due on the said bonds respectively, or any part thereof, shall be paid off and discharged in my life-time, or be received or recovered by my executors after my decease, then in such case my said daughters *Jane* and *Harriott*, and their husbands, shall thereupon have and be entitled to their respective legacies, or such part thereof respectively as shall not be so redeemed or satisfied as aforesaid, for the benefit of themselves and their children respectively, in the manner and according to the trusts and directions hereinbefore by me provided and declared or referred to, of and concerning the same.

The said testator afterwards made a codicil to his will, dated the 18th day of September 1824, and thereby bequeathed, in trust for each of his four daughters, (including the said *Jane Prior*, the wife of the said *William Prior*,) the further sum of 500*l.*, upon the same trusts as were declared by his said will of and concerning the said several sums of 3500*l.* thereby provided for his said four daughters, but subject, nevertheless, as to the said further legacies of 500*l.* in-

tended or provided for his said daughters, *Jane Prior* and *Harriott Cook* respectively, to such and the like conditions and declarations, charges and liabilities, with regard to the payment of the amounts of the principal and interest due on the respective bonds of the said *William Prior* and *William Cook*, in his said will mentioned or referred to, as the respective legacies of 1000*l.* and 3500*l.*, and other the monies therein mentioned, and thereby charged therewith, would be insufficient to pay and satisfy.

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Rowley died in December 1826, and the will and codicil were proved by *Thomas Rowley*, one of the executors named. The 6000*l.* intended to be secured by the bond of *Prior* became payable on the 28th July 1830, and various sums, amounting in the whole to 762*l.* 6*s.* 8*d.*, were paid to *Rowley* the executor, by *Prior*, in respect thereof, and the same was appropriated by him in part satisfaction of the two legacies of 3500*l.* and 500*l.* given by the said will and codicil, leaving the sum of 3237*l.* 13*s.* 1*d.* due in respect thereof.

On the 16th day of December 1830, a commission issued against *Prior*, and the petitioner *Florance Young*, *Robert Morecock* (since deceased), and *J. Howell*, were chosen assignees; and in October last *George Gibson* was appointed official assignee. *Rowley*, as executor, was allowed to prove under the commission for the sum of 4243*l.* 10*s.* 9*d.*, being the amount due from *Prior* at the time of his bankruptcy upon his bond, after deducting the above sum of 762*l.* 6*s.* 8*d.* *Rowley*, the executor, received two dividends of 1*s.* 6*d.* and 4½*d.* in the pound on the debt proved by him, which dividends amounted to the sum of 402*l.* 5*s.*, of which 306*l.* 18*s.* 1*d.* was received in

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respect of the 3277*l.* 13*s.* 4*d.* remaining due in respect of the legacies of 3500*l.* and 500*l.*; and the 306*l.* 18*s.* 1*d.* being added to the 762*l.* 6*s.* 8*d.* paid by *Prior* in the year 1830, makes the sum of 1069*l.* 4*s.* 9*d.* as the amount received by *Rowley* the executor, on account of the said legacies of 3500*l.* and 500*l.* bequeathed to him in trust for *Jane Prior* and *William Prior* and their issue. Part of the 1069*l.* 4*s.* 9*d.* had been invested in the purchase of 1168*l.* 7*s.* 7*d.* bank annuities, and the sum of 43*l.* 15*s.* 9*d.* remained in cash in the hands of *Rowley*. *Jane Prior* died on or about the 14th day of October 1834, whereupon the petitioners claimed, that as assignees of the estate and effects of *Prior*, they became entitled to receive, for the benefit of the creditors of *Prior*, the interest and dividends of the sum of 1168*l.* 7*s.* 7*d.* bank annuities, and of the sum of 43*l.* 15*s.* 9*d.* sterling when invested, and of such other sums as were or should be received for or in respect of the said legacies of 3500*l.* and 500*l.*, and the stocks, funds, and securities, in or upon which the same should from time to time be invested, for and during the residue of the life of *Prior*. And the petition prayed that they might be declared so entitled, and that *T. Rowley*, and the future trustee or trustees of the will and codicils of the said *T. Rowley* deceased, might be directed to pay the said interest and dividends to the petitioners from time to time, as the same should become due and payable during the life of *Wm. Prior*.

Mr. *Swanston*, for the petitioners, the assignees, relied on *Stratton v. Hale*(*a*), and contended, that *Ex parte Turpin* (*b*) had been since virtually over-

(*a*) 2 Bro. C. C. 490.

(*b*) 1 Dea. & Ch. 120, S. C. Mont. 443.

ruled by the case of *Ex parte Shute* (a), and cited *re Meagham* (b).

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Mr. *Bethell*, for the trustees, *contra* (c).

Cur. adv. vult.

Sir JOHN CROSS.—In this case the bankrupt was indebted on bond to trustees in a large sum of money, which was to be placed out at interest in trust for his wife for life, then for himself for life, and then for the issue of the marriage. Part of the debt he had paid before his bankruptcy, and the trustees have since proved for the residue, and received dividends in respect thereof, which have been invested in government securities, pursuant to the will. The wife being dead, the question is, whether the interest of the dividends is to be retained by the trustees during the life of the bankrupt, until the whole debt is made good, or whether it is to be received by the assignees for the benefit of the general creditors. If this were a new question, I am not prepared to say on which side my judgment would preponderate. The principle on which it mainly depends has been frequently discussed and determined in cases where the bankrupt's wife was a party, and her marriage portion the subject in dispute; and the peculiarity of the present case is, that the wife is no party, nor is the subject-matter her portion, she being dead. The earliest case to be found on this subject is *Ex parte Smith*,

(a) 3 Dea. & Ch. 1; S. C. Mont. & B. 385.

(b) 1 Sch. & Lef. 179.

(c) I was not present during the argument—E. C. See *Nail v. Punter*, 5 Sim. 555.

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re Osman (a), which was decided by Lord *Hardwicke* about a century ago. In that case a bankrupt, in consideration of his wife's portion, gave a judgment to trustees for a sum, in trust for himself for life, and then to his wife, with remainder over. The Lord Chancellor ordered the interest of the dividends, during the life of the bankrupt, to be paid to the assignees for the benefit of the creditors. Again, in a few years afterwards, in *Groom's case* (b), Lord *Hardwicke* stated it as a general rule, that "if a husband becomes a bankrupt after breach of payment to trustees, they have always been admitted creditors upon equitable terms, and the Court has taken care that the interest of the money shall be paid to the creditors under the commission during the life of the husband, and the principal secured to the wife in case she survives the husband." Lord *Thurlow* adopted the same rule; and in *Mitford's case* (c) he allowed the trustees to retain the interest on government securities which belonged to the wife before the marriage; but, on the other hand, he ordered that the assignees should take the interest on the dividends derived from the bankrupt's estate during his life, in respect of trust money lent him in which he had a life interest. And again, in *Stratton v Hale* (d) (which was the case of a bill in equity filed by assignees against trustees of a fund in which the bankrupt had a life estate, and which had been, as in the former case, lent to the bankrupt, and proved as a debt under his commission, and dividends paid thereon,) the assignees sought to recover the interest on the dividends during

(a) Cooke, B. L. 224, ed. 1817.

(b) 1 Atk. 115.

(c) 1 Bro. C. C. 399. See the order more fully in *Priddy v. Rose*, 3 Mer. 105.

(d) Bro. C. C. 490.

the life of the bankrupt. The trustees contended for the right now claimed, to retain the dividends to make good the deficiency on the debt; but that was not allowed, and the interest was decreed to be paid to the assignees. That case appears to have been well considered by Lord *Thurlow*, and was argued by the Attorney-General for the creditors, and by Lord *Eldon*, then Solicitor-General, for the trustees; and against that decree we do not find there was any appeal. This was the last reported case prior to the change of jurisdiction introduced by the 1 & 2 W. 4. c. 56. Debts of this description, being generally of the class of contingent debts, were rarely proveable at all, until the act, 6 Geo. 4. c. 16. s. 56., provided for the admission of contingent debts. Soon after this Court came into existence, *Turpin's* case (a) revived the question, which I own I, till then, thought was quite at rest, after the decisions I have referred to, ingrafted as they had long been into every text book on this branch of the law. But we were told (in *Turpin's* case), much to my surprise, that Lord *Eldon* had long been in the habit of deciding contrary to the case of *Stratton v. Hale*, inasmuch that the new doctrine was well known to all the practitioners in his Court. This appeared very remarkable, for the case was one of too rare occurrence to have become a matter of habitual practice. Besides, there were several learned reporters at the Chancery bar during all Lord *Eldon's* time, who regularly published the valuable decisions of that revered judge, and they are, one and all, silent on this subject. It was the same with all the contemporary text writers. One

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(a) 1 Dea. & Ch. 120; S. C. Mont. 443.

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of these, Mr. *Cook*, who during nearly the whole time practised extensively before Lord *Eldon* in this branch of the law, and whose book was the chief oracle of the profession for such matters, published no less than eight editions of his book without any allusion to this new doctrine. On the contrary, he has in every one of them reported the first case before Lord *Hardwicke* as the existing rule, and referred to the other cases as confirming it. However, upon searching Lord *Eldon's* manuscript order books, one unpublished case was found, in which, twenty years ago, trustees were allowed, in favour of the wife, to retain the bankrupt's annuity, in compensation for the deficiency in the trust funds. Whether that case was contested does not appear; but, with no other precedent, the majority of the judges in this Court adopted the new doctrine, and over-ruled the decisions of the former Chancellors.

The next and last was *Shute's* case (*a*). There a part only of the trust fund was the wife's marriage portion, and the rest was not; and the majority of the judges of this Court therefrom adjudged, that, in respect of the wife's portion, the trustees should appropriate an adequate part of the bankrupt's annuity to make good the deficiency; but as to the rest, that it should go to the general creditors, and thereby, as it appears to me, established a clear distinction, and expressly confined the new doctrine to the wife's property. Now in the present case no part of the trust fund was the wife's marriage portion, nor is there any interest of her's to be protected, she having died before the question arose. It appears therefore to me, that to allow these trustees

(*a*) Mont. & Bli. 385; S. C. 3 Dea. & Ch. 1.

to retain the bankrupt's annuity from the general creditors is to extend the new doctrine beyond any former case, and thus to be directly at variance with the last determination of this Court. Under these impressions I feel it to be my duty, however reluctantly, to dissent from the present opinion of my learned brethren, which I should do with more distrust of my own judgment if it were not in conformity with that of Lord *Hardwicke* and Lord *Thurlow*, and sanctioned by the acquiescence of the profession for nearly a whole century, as well as by the last decision of this Court. My opinion upon the present case is, that the annuity ought to be forthwith sold for the benefit of all the creditors equally, among whom the trustees will be entitled to a due share, to be applied in augmentation of the trust fund.

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ERSKINE, C. J.—As I have the misfortune to differ from my learned colleague, I think it right to add my reasons for adhering to the opinion I expressed at the close of the argument on a former day, viz. that the assignees are not entitled to the relief they pray. Their prayer in substance is, that they may be declared entitled, as assignees of the estate and effects of *William Prior*, to receive during his life, for the benefit of his creditors, the interest and dividends of 1168*l.* bank-annuities, purchased by one *Thomas Rowley*, the executor of another *Thomas Rowley* deceased. It appeared by the affidavits that *William Prior*, the bankrupt, married the daughter of the deceased *Thomas Rowley*, who by his will, after leaving the bankrupt a legacy of 1000*l.*, desired his executors to invest the sum of 3500*l.*, and to pay the dividends to his daughter *Jane*, the wife of the bankrupt, for her life, and upon her

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death, in the lifetime of her husband, to pay the interest or dividends to the bankrupt for his life, and after his death to stand possessed of the principal sum of 3500*l.*, and of securities in which the same might be invested for the use of the children of the marriage. He afterwards, by a codicil, directed the further sum of 500*l.* to be laid out in like manner for the same purposes; thus increasing the bequest to 4000*l.* The testator died in 1826. In 1830 *Prior* became bankrupt, and in 1834 his wife died. If these had been all the facts of the case, the right of the assignees to receive, during the bankrupt's life, the dividends of the trust fund in the hands of the trustees, would have been indisputable, and the only question would have been—though this would not have been the Court to decide it—what was the amount of assets in the hands of the executor applicable to the bequest in question. But it appears that the bankrupt, at the time of the execution of the will and of the testator's death, was indebted to the testator in the sum of 6000*l.*, secured by his bond payable in July 1830; and the testator by his will, after reciting the existence of this debt so secured, declared and directed, that if the principal sum and interest should not be paid in his lifetime, the same should be accounted for and go and be taken, in part or in the whole, in redemption and satisfaction, as well of the said legacy of 1000*l.* given to the bankrupt, as also of the legacy bequeathed in trust for his daughter *Jane Prior* and their children, thereby clearly intimating his desire, that the trustees should not be called upon to invest any part of the 4000*l.* for the purposes of the trust, so long as a debt to that amount remained due upon the bankrupt's bond. When, therefore, in

1830, the money secured by the bond became due, the bankrupt, after deducting 1000*l.* for his own legacy, would remain indebted to the executor in 3500*l.* It appears that the bankrupt had before his bankruptcy paid the executors 762*l.*, leaving a balance, for principal and interest, of 4243*l.* In this state of things, neither the wife, if living, nor the bankrupt, if solvent, could have called on the trustees for any payment under the bequest of the 4000*l.*; for, by the express direction of the will, the balance due was to be taken in redemption and satisfaction of that legacy. The executors, however, being authorized by the will to pursue all lawful remedies for the recovery of the whole or such part of the debt as they in their discretion should see fit, upon the issuing of the fiat tendered a proof and were admitted creditors for the balance of 4243*l.*, and have received dividends upon that proof to the amount of 402*l.*, reducing the balance due from the bankrupt on his bond to 3841*l.*, which, being deducted from the 4000*l.*, the amount of the legacy, would become 158*l.*, the sum to be accounted for by the trustees as money in their hands in respect of that legacy; and the interest arising from this sum of 158*l.* is the only amount which the bankrupt or his assignees could be entitled to claim from the trustees in respect of that bequest, if the objection discussed upon the argument, and decided in the case of *Ex parte Turpin* (a), had not been interposed. Trifling, however, as is the amount really in issue, still, as there is something to raise this question upon, it becomes the duty of the Court to decide it. Upon the argument, the

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(a) Mont. 443 ; S. C. 1 Dea. & Chit. 120.

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counsel for the assignees rested their claims upon the doctrine laid down in the case of *Stratton v. Hale* (a), and contended, that the case of *Ex parte Turpin* was erroneously decided, and had been in effect since overruled in *Ex parte Skute* (b). And although, at the close of the argument in the present case, my opinion in *Ex parte Turpin* (c) remained unshaken, yet, in deference to the wish of my learned colleague (d), and in the hope that we might all eventually come to the same conclusion, the judgment of the Court was deferred, unfortunately without the desired result; for his Honor Sir J. Cross is still compelled to withhold his assent to the opinion already expressed by the rest of the Court. After the most careful revision of our judgment in *Ex parte Turpin*, and of the different authorities bearing upon the question, I am satisfied that our decision was right, and that the case of *Stratton v. Hale* (e) would not now receive the sanction of any Court in Westminster Hall. The debt in *Ex parte Smith, re Osman* (f), was one that could only be proved under the provision of the 7 Geo. 1. c. 21, as *debitum in presenti solvendum in futuro*, upon which, therefore, there ought to have been a deduction in respect of the time then to run; but the Court, instead of reducing the proof then on the proceedings for the whole sum, directed the interest on the dividends to be paid by the assignees during the bankrupt's life; for there was no debt payable to the trustees till his death, or the death of the wife; thus working out the relief to which the creditors were entitled by different means. And the

(a) 2 Bro. C. C. 490. (b) Mont. & Bli. 385; S. C. 3 Dea. & Ch. 1.

(c) Mont. 443; S. C. 1 Dea. & Ch. 120. (d) Sir J. Cross.

(e) 3 Bro. C. C. 430. (f) Cooke, B. L. 224, edit. 1817.

decision in *Ex parte Mitford* (a) only declared, that according to the provisions of the same statute, there must in that case be a rebate of the interest, and that the assignees would have a right to retain whatever the bankrupt could claim against the trustees, a right which has never been disputed; and the order which is set out in *Priddy v. Rose* (b) appears to me to be opposed to the principle contended for by the present assignees; and that it was so, in the opinion of Sir William Grant, I think obvious, from his language in *Priddy v. Rose*, which was quoted in the argument of *Ex parte Turpin* (c), and which fully supports the decision of that case. Sir William Grant says, "See how the case would have stood between the trustees and *Hunt* himself. I apprehend it to be clear that he could not have claimed a benefit himself under the settlement, without making good his part of it. The trustees might give him what credit they chose, subject to their responsibility to their *cestui que trust*, but they might, at any time after the 4000*l.* became due, have stopped the dividends if the money was not paid. Supposing he had become a bankrupt, the trustees would have this equity as against the assignees, as was determined by Lord Thurlow in *Ex parte Mitford*" (d); and then he read the order in *Ex parte Mitford* in support of that position, by which it appeared, that though the interest of the dividends under the proof, which would be of very small amount, was directed to be paid to the assignees during the bankrupt's life, the trustees were directed to retain an annuity of 24*l.* upon the joint lives of the bankrupt and

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(a) 1 Bro. C. C. 396.

(b) 3 Mer. 135.

(c) Mont. 443; S. C. 1 Des. & Ch. 120.

(d) 1 Bro. C. C. 399.

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his wife, and the interest of £704*l.* bank annuities, which otherwise would have been payable to the bankrupt for his life, towards the discharge of the principal sum due from the bankrupt. So that in effect the equity of the trustees to retain the interest for accumulation, as against the assignees, contrary to the authority of *Stratton v. Hale* (a), has been recognized by Lord Thurlow himself in *Ex parte Mitford* (b), by Sir William Grant in *Priddy v. Rose* (c); it was afterwards acted upon by Lord Eldon in *Ex parte Le Maister, re Ramsay* (d), and by this Court in *Ex parte Turpin* (e); and it does not appear to me that the case of *Ex parte Shute* (f), so much relied upon in the argument, is at all opposed to the decision of *Ex parte Turpin*.

The case of *Ex parte Shute* turned upon its own peculiar circumstances: a bond had been prepared for the purpose of defeating the fair operation of the bankrupt laws, and the Commissioners, having no power to protect the creditor by any restraint upon the dividend, rejected the proof altogether. The wife applied for the interposition of this Court, which was called upon not to administer the ordinary equities arising out of a case of simple default by the bankrupt, but to defeat a fraudulent contrivance, without depriving the wife of the protection to which she was fairly entitled. The claim to have the principal money secured by the bond, proved as debt against the husband's estate, was not disputed by the assignees: but it was contended that the stipulation for payment of the interest of the fund to the wife, in the event of the husband's bankruptcy,

(a) 3 Bro. C. C. 430.

(b) 1 Bro. C. C. 309.

(c) 3 Merr. 135.

(d) 1 Mont. 452 (note).

(e) Mont. 443; S. C. 1 Dea. & Ch. 120.

(f) Mont. & Bli. 385; S. C. 3 Dea. & Ch. 1.

was fraudulent and void; to this the Court agreed, as to the greater part of the claim; but to the extent of the wife's own fortune the Court thought, upon the authority of *Ex parte Meaghan* (a) and other cases, that the wife was entitled to the benefit of that stipulation. If we had intended to have revoked that opinion expressed in *Ex parte Turpin*, and to recur to the opinion adopted in *Stratton v. Hale* (b), the order would have been for the separate investment of the dividends paid in respect of the wife's fortune, and for the payment of the interest upon that investment to her, and of the interest of the remainder of the dividends to the assignee for the bankrupt's life; while, on the other hand, if the Court had allowed the interest on the whole of the dividends to be paid to the wife, directly or indirectly, by way of accumulation, it would have given effect, in a great measure, to the very fraud it was its duty to defeat. By the adoption of a middle course therefore, namely, by giving to the wife the interest upon her own fortune at once, and the remaining interest to the assignees during the bankrupt's life, the principle of the decision in *Ex parte Turpin* (c) was not lost sight of, while it was in some degree modified, as in the case of *Ex parte Mitford* (d), to meet the peculiar circumstances of the case. But if it could have been shown that the decision in *Ex parte Shute* (e) was in some degree inconsistent with the judgment in *Ex parte Turpin*, I should now abide by that judgment; and, therefore, as in this case the whole debt arises out of a contract with the wife's fa-

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(a) 1 Sch. & Lef. 179.

(b) 3 Bro. C. C. 490.

(c) Mont. 443; S. C. 1 Dea. & Ch. 120.

(d) 1 Bro. C. C. 399.

(e) Mont. & Bli. 385; S. C. 3 Dea. & Ch. 1.

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ther, by whom the amount of that debt has been settled in reversion upon his daughter's children, and there is no principle of public policy to interfere with the full application of the principle of that judgment to the present case, I am of opinion that the assignees are not entitled to the interest of the trust fund, until by the accumulation of that interest the whole fund of 4000*l.* shall have been made good. When that is done the assignees will be entitled to the interest, and they may either have an order to that effect, or have their petition dismissed.

Sir G. ROSE concurred in opinion with his Honor the Chief Judge.

APPENDIX.

5 & 6 WILLIAM IV. c. 29.

An Act for investing in Government Securities a Portion of the Cash lying unemployed in the Bank of England belonging to Bankrupts Estates, and applying the Interest thereon in discharge of the Expenses of the Court of Bankruptcy, and for the Relief of the Suitors in the said Court; and for removing Doubts as to the Extent of the Powers of the Court of Review and of the Subdivision Courts. [21st August 1835.]

WHEREAS by an act passed in the first and second years of the reign of his present Majesty, intituled "An act to establish a court in bankruptcy," it was enacted, that it should be lawful for his Majesty, his heirs and successors, to establish a court of judicature, which should be called "The Court of Bankruptcy," and to appoint judges, commissioners, and other officers of the said court; and that it should be lawful for the lord chancellor to choose official assignees to act in all bankruptcies prosecuted in the said court, and to collect the effects of bankrupts, and to pay the proceeds thereof into the Bank of England to the credit of the accountant-general of the High Court of Chancery, subject to the order of the lord high chancellor, or the said court or any judge thereof, as therein mentioned; and it was further enacted, that certain fees and sums of money specified in the said act should be received by the lord chancellor's secretary of bankrupts, and paid by him into the Bank of England, to the credit of the said accountant-general, to an account to be intituled "The secretary of bankrupts account," and that there should be paid out of the monies standing to that account certain yearly sums specified in the said act as and for salaries to the judges and other officers of the said court for the time being: and it was further enacted by the said act, that certain annuities, the amount

1 & 2 W. 4.
c. 56.

thereof to be ascertained and certified as in the said act is mentioned, should be respectively paid to the patentee for the execution of the laws and statutes concerning bankrupts, to certain persons then acting as commissioners of bankrupt in London, and to certain officers of the lord chancellor, and of the High Court of Chancery mentioned in the said act, in lieu of and as compensation for certain fees and emoluments accustomed to be received by them, and which would by the provisions of the said act be wholly discontinued and abolished, out of the monies and securities standing to an account to be opened by the said accountant general, to be intituled "The secretary of bankrupts compensation account;" and that certain fees and sums of money specified by the said act should be paid by the said official assignees into the Bank of England to the credit of the said accountant general, to be carried to the said accounts respectively: and whereas his Majesty did, by virtue and in pursuance of the said act, establish the said court of bankruptcy, and did appoint judges and commissioners, and registrars and deputy registrars of the said court: and whereas official assignees have been chosen by the lord chancellor to act in bankruptcies as aforesaid: and whereas the amount of certain annuities have been duly ascertained and certified, in pursuance of the said act, to be due and payable to the persons therein mentioned, in lieu of the fees and emoluments aforesaid: and whereas an account has been opened in the Bank of England by the said accountant general, intituled, "The secretary of bankrupts account," and another account has been opened in the Bank of England by the said accountant general, intituled "The secretary of bankrupts compensation account:" and whereas the said official assignees have paid into the Bank of England in the name of the said accountant general divers large sums of money, which have been placed to the credit of the several bankrupts estates: and whereas there now is and has been for a long time a very large sum of money belonging to bankrupts estates, or to suitors in matters of bankruptcy, standing in the name of the said accountant general, which lies dead and unemployed in the said Bank of England: and whereas it was necessary for the said accountant general to appoint certain

persons to act as clerks in the performance and execution of the duties imposed upon him by the said act; but no provision is made by the said act for the salaries of the said clerks and the other expenses necessarily incident to the performance of the said duties, other than out of certain fees directed to be paid to the chief registrar of the said court: and whereas the business arising from the duties imposed upon the said accountant general by the said act is gradually increasing, and the present establishment of clerks is likely to become inadequate to transact the same with that accuracy and despatch which is necessary for the public service: and whereas the payment of the fees authorized by the said act, or a part thereof, will become unnecessary, and the same may be discontinued if another fund is provided for the payments now made out of the said fees by the authority of the said act: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that out of the cash belonging to the estates of bankrupts, or to suitors in matters of bankruptcy, that now lies or shall hereafter lie dead and uninvested on securities in the Bank of England, in the name of the said accountant general, or of the accountant in bankruptcy hereafter mentioned, any sum or sums not exceeding in the whole the sum of three hundred thousand pounds, shall and may, by virtue of any order or orders of the lord high chancellor to be made for that purpose, from time to time be placed out in one entire sum or in parcels, in the name of the said accountant general or of the said accountant in bankruptcy, after the appointment of the said last-mentioned accountant, on such government or parliamentary securities as in and by such order or orders shall be directed; and such securities shall be carried to an account to be intituled "The bankruptcy fund account," subject to such rules and orders as the lord high chancellor shall think fit to prescribe for the purposes herein mentioned.

Part of the money in the bank belonging to bankrupts estates to be carried to an account to be called "The bankruptcy fund account."

II. And whereas the monies and securities standing to the credit of the said account, intituled "The secretary of bank-

Sum advanced to credit of bankrupts com-

pensation account to be repaid by order of lord chancellor.

rupts compensation account," were in the month of August one thousand eight hundred and thirty-four found inadequate to meet the several payments then due and payable thereout, and the sum of two thousand four hundred pounds was, on application to the lords commissioners of his Majesty's treasury, then advanced and paid by them, through the lord chancellor's secretary of bankrupts, into the Bank of England to the credit of the said account, for the purpose of enabling the several payments then due to be paid and discharged to the parties entitled thereto; but no power or authority exists under the provisions of the said first recited act, or otherwise, for the repayment of such sum out of the monies and securities standing to the credit of the said account; be it therefore enacted, that it shall be lawful for the lord high chancellor to order that the said sum of two thousand four hundred pounds so advanced and paid by the lords commissioners of his Majesty's treasury to the credit of the said account, intituled "The secretary of bankrupts compensation account," shall be repaid out of the monies and securities which now are or hereafter may be standing to the credit of such account, and the same shall be repayable and repaid accordingly, and until so repaid be considered a charge on such account; any thing in the said first-recited or other act or acts contained to the contrary notwithstanding.

Lord chancellor to appoint accountant in bankruptcy.

III. And whereas from the increased amount of the funds belonging to bankrupts estates, and the large number of accounts to which such funds belong, and which are daily augmenting, it appears that such funds and such accounts cannot be properly protected and managed by the said accountant general of the High Court of Chancery, and it is expedient therefore that an officer experienced in and conversant with the mode of keeping accounts, to be called "The accountant in bankruptcy," shall be forthwith appointed to superintend and control the care and management of the said funds; be it therefore enacted, that it shall be lawful for the lord high chancellor for the time being to nominate from time to time as occasion may require some fit and proper person to be the accountant in bankruptcy; which officer

so to be appointed shall hold his office during good behaviour, notwithstanding the demise of his Majesty, or any of his heirs or successors: provided always, that it shall be lawful for the lord high chancellor by any order to remove any such officer, for some sufficient reason to be in such order expressed.

IV. And be it further enacted, that at any time after the appointment of the said accountant in bankruptcy it shall and may be lawful for the lord high chancellor, by any general or other order or orders, to direct that the whole or any part of the cash, funds, or securities belonging to bankrupts estates or to suitors in matters of bankruptcy, and then standing in the name or to the credit of the said accountant-general of the High Court of Chancery at the Bank of England, to the credit of any bankrupts estate, or of any assignee or assignees of such estate, or in the matter of any bankruptcy, be forthwith paid and transferred into the name and to the credit of the said accountant in bankruptcy; and all such payments or transfers as now are or heretofore have been made into the bank in the name or to the credit of the accountant general of the High Court of Chancery in matters of bankruptcy, shall, from and after the appointment of the said accountant in bankruptcy, be made in the name or to the credit of the said accountant in bankruptcy; and all cash, funds, or securities to be so paid or transferred as aforesaid shall be subject to such and the like provisions, regulations, rules, and orders as the same are or would have been subject to if paid or transferred in the name or to the credit of the said accountant general of the Court of Chancery, except as the same may be altered by this act, or any rule or order to be made by the lord high chancellor in respect of the same.

Bankrupts estates to be transferred into the name of the accountant in bankruptcy.

V. And whereas by an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled "An act to amend the laws relating to bankrupts," it is amongst other things enacted, that the assignees shall file a certificate in the office of the lord chancellor's secretary of bankrupts, containing an account of the names of creditors to

So much of 6 G. 4. c. 16. as directs the filing of the certificate, and the investment, &c. of unclaimed dividends, repealed.

whom unclaimed dividends are due, and of the amount of such dividends; and power is thereby given for the investment of such dividends; and after the expiration of three years the lord chancellor is empowered to order the same to be divided amongst and paid to the other creditors in manner therein mentioned; be it enacted, that so much of the said act as directs the filing of the said certificate, and the investment, division, and payment of such unclaimed dividends, be and the same is hereby repealed.

Unclaimed dividends to be paid into the bank to the credit of accountant general, or when appointed, to the accountant in bankruptcy.

VI. And be it further enacted, that all dividends unclaimed as hereinafter mentioned, and also any undivided surplus of a bankrupt's estate, over and above the amount finally directed to be divided among the creditors of any bankrupt, shall be paid into the Bank of England to the credit of the accountant general of the High Court of Chancery, or of the accountant in bankruptcy, when such last-mentioned officer shall have been appointed, to be carried to an account to be intitled, "The unclaimed dividend account," subject to the order of the lord high chancellor, or of the Court of Review in bankruptcy, or of any commissioner of the said court, for the payment thereof of any dividend or dividends due to any creditor or creditors, and subject also to the order of the lord chancellor for the laying out and investment thereof in the purchase of government or parliamentary securities, which securities shall be carried to the before-mentioned account to be intitled "The bankruptcy fund account," and shall be subject to such rules and regulations as the said lord chancellor shall direct: provided always, that any order of any commissioner for payment of any dividend, under the provisions aforesaid, shall be subject to appeal to the said Court of Review.

How unclaimed dividends, &c. in the hands of assignees to be disposed of.

VII. And be it further enacted, that if any assignee under any commission of bankrupt or fiat in bankruptcy now issued or hereafter to be issued shall have, either in his own hands, or at any bankers, or otherwise subject to his order or disposition, or shall know that there is or are in the hands or subject to the order and disposition of himself and any co-as-

signee or co-assignees, or of any or either of them, any unclaimed dividend or dividends amounting in the whole to the sum of twenty pounds, or any such undivided surplus as aforesaid, amounting to the sum of twenty pounds, such assignee shall, as to any such now existing unclaimed dividend or dividends, within one year after the passing of this act, and as to any future dividend or dividends, within three calendar months next after the expiration of one year from the time of the declaration and order of payment of such future dividend or dividends, either pay the same to the creditor or creditors or other the person or persons entitled to the same respectively, or cause a certificate thereof respectively to be filed in the office of the lord chancellor's secretary of bankrupts, containing a full and true account of the name or names of the creditor or creditors to whom such unclaimed dividend or dividends is or are respectively due, and of the amount of such dividend or dividends respectively; and shall in like manner, as to any such now existing undivided surplus as aforesaid, within one year after the passing of this act, and as to any such future undivided surplus as aforesaid within three calendar months next after the expiration of one year after the final declaration of dividends cause a certificate stating the full and true amount of such surplus to be filed in the office of the said secretary of bankrupts; and every certificate to be filed as aforesaid shall be signed by the assignee or assignees filing the same; and every assignee who shall, according to the provisions of this act, be bound to file such certificate as aforesaid, and who shall make default in filing the same, shall be charged, in account with the estate of the bankrupt, with interest upon the amount of such unclaimed dividend or dividends or undivided surplus as aforesaid, to be computed from the time at which such certificate is hereby required to be filed, at the rate of five pounds per centum per annum, for such time as he shall thenceforth either solely or together with any co-assignee or co-assignees, or other person or persons, retain such dividend or dividends or undivided surplus, as the case may be, and also with such further sum as the lord chancellor or the Court of Review shall direct, not exceeding in the whole at the rate of twenty pounds per

centum per annum, to be computed from the time aforesaid; and every assignee shall, within one year next after the filing of any such certificate as aforesaid, pay or cause to be paid into the Bank of England to the name of the accountant-general of the High Court of Chancery, or of the accountant in bankruptcy, when such last-mentioned officer shall have been appointed, to be carried to the said account to be intituled "The unclaimed dividend account," the full amount of the unclaimed dividends mentioned in such certificate, or so much thereof as shall not have been then paid to the creditor or creditors or other person or persons entitled thereto, and also the full amount of such undivided surplus as aforesaid; and if any assignee shall make default in such payment it shall be lawful for the lord chancellor or the said Court of Review, on petition or otherwise, to order that such sum or sums be forthwith paid into the Bank of England in manner aforesaid, together with such further sum to be charged on such assignee or assignees, or other party or parties personally, as to the said lord chancellor or to the said court may seem fit, not exceeding at and after the rate of twenty pounds per centum per annum on the sum or sums so withheld, to be computed from the filing of such certificate up to the time of payment of such sum or sums, and also to make such further order as to costs as the justice of the case shall seem to require: provided always, that no such certificate as aforesaid of any unclaimed dividend or dividends shall be filed until the expiration of one year after the declaration and order for payment of such dividend or dividends.

Certificates to be given to assignees, on production of which Bank of England shall receive the sums therein mentioned, and give receipts for the same.

VIII. And be it further enacted, that the said accountant general in Chancery or the said accountant in bankruptcy, as the case may be, shall, on the application of any assignee or assignees, give to him or them a certificate or certificates stating the amount of any sum or sums of money which he or they may be desirous of paying into the Bank of England under the provisions aforesaid; and on the production of such last-mentioned certificate or certificates the governor and company of the Bank of England shall receive the sum or sums therein mentioned, and give a receipt or receipts for the same, and shall

forthwith carry the same to the credit of the said accountant general or the accountant in bankruptcy, as the case may be, to the said account intituled "The unclaimed dividend account;" and every such certificate and receipt shall be given without fee or reward.

IX. And be it further enacted, that the interest and dividends of all the securities to be purchased under the authority of this act shall from time to time be received by the governor and company of the Bank of England, and be carried to an account to be intituled "Interest arising from the bankruptcy fund account," to the credit of the accountant general in Chancery or the accountant in bankruptcy, as the circumstances may require.

Interest to be received by the governor and company of the bank.

X. And be it further enacted, that out of the interest and dividends of the government or parliamentary securities to be purchased under the authority of this act, and out of the interest and dividends of any government or parliamentary securities to be hereafter purchased and placed to the said account to be intituled "The bankruptcy fund account," there shall be paid by the governor and company of the Bank of England, by virtue of any order or orders of the lord chancellor to be made for that purpose, to the said accountant in bankruptcy, such salary or yearly sum as the lord high chancellor may by any order or orders direct, not exceeding the yearly sum of eight hundred pounds, and also to the clerks of the said accountant in bankruptcy such sums by way of salary as the lord chancellor shall by order direct, and also any further sum to the said accountant in bankruptcy which may be necessary or expedient to defray the expenses of stationery, and other necessary expenses of the said accountant, if any, to be by him incurred in discharge of the duties imposed upon him by this act; such several salaries or yearly sums before mentioned to be paid quarterly, free of charges; the first quarterly payment to the accountant in bankruptcy for the time being to commence from the day of his appointment, and as to the said clerks to commence from the eleventh day of January one thousand eight hundred and thirty-five, or from

Salaries and other expenses to be paid out of the same by direction of the lord chancellor.

such other day as may in any such order be specified: provided always, that nothing hereinbefore contained shall authorize the lord chancellor to order the payment in any one year of any sum exceeding the sum of one thousand pounds for the payment of the salaries of the said clerks, and the discharge of such expenses of stationery and other incidental expenses as aforesaid.

Lord chancellor
may appoint ad-
ditional clerks if
necessary.

XI. And be it further enacted, that it shall and may be lawful to and for the lord high chancellor, upon the requisition of the said accountant in bankruptcy for that purpose, to appoint one or more, not exceeding five, persons to be clerks to the said accountant, and to order such yearly salaries as aforesaid to be paid to them.

Accountant not
to retain fees.

XII. And be it enacted, that the salaries herein-before provided shall be in lieu of all fees and emoluments whatsoever; and that all such fees and emoluments, whether for commission, brokerage, or otherwise, as are now receivable by the said accountant general of the Court of Chancery in matters of bankruptcy, shall, from and after the appointment of the said accountant in bankruptcy, be received by him, and paid into the bank in the name of the said last-mentioned accountant and be carried to the credit of the said account to be intituled "Interest arising from the bankruptcy fund account," and be applicable to all the purposes of the said account.

Retiring allow-
ance to Charles
Elley.

XIII. And whereas *Charles Elley*, the chief clerk in the office of the lord chancellor's secretary of bankrupts, is now of the age of seventy years and upwards, and has been upwards of fifty years in the above office, and from rheumatism and other bodily infirmities is become incapable of giving full attendance so as effectually to discharge the duties of the said office, and the emoluments of his said office were very much reduced by the operation of the said first-recited act, and the said *Charles Elley* is desirous to be allowed to retire from the said office by reason of such infirmities; be it therefore enacted, that it shall and may be lawful for the lord high chancellor, upon the retirement or removal from his said office of the said *Charles Elley*, to order and direct that there shall be

paid to him during his life such annual sum not exceeding four hundred pounds per annum as to the said lord chancellor shall seem fit, such annual sum to commence on the retirement or removal of the said *Charles Elley* as aforesaid, and be payable at such time or times as the said lord chancellor shall direct ; which said annual sum shall be chargeable upon and payable out of the said account intituled "The secretary of bankrupts compensation account."

XIV. And be it further enacted, that it shall be lawful for the said lord high chancellor, by any order or orders to be by him from time to time made for that purpose, to order and direct that all or any part of the interest and dividends to be carried to the said account to be intituled "Interest arising from the bankruptcy fund account," may be carried over to the said accounts respectively, intituled "The secretary of bankrupts account," and "The secretary of bankrupts compensation account," or either of them, and that the same may be applied in payment or in part satisfaction of the annual and other sums now or hereafter to be chargeable upon and made payable out of the sums directed to be carried to the said last-mentioned accounts or either of them, and also to direct that the salaries and other sums by the said first-recited act directed to be chargeable upon or payable out of the fees by the said act directed to be paid to the chief registrar of the court of bankruptcy may be paid out of the said interest and dividends, as the said lord high chancellor shall in his discretion see fit, so that the salaries and other expences of the said court being provided for out of the interest and dividends to be raised as aforesaid, the fees and other sums by the said act directed to be paid may be abolished or reduced as the said lord high chancellor may find himself from time to time enabled to abolish or reduce the same.

Lord chancellor may direct interest from securities to be carried to the secretary of bankrupts account.

XV. And be it further enacted, that it shall and may be lawful to and for the said lord high chancellor, by any order or orders, to direct that all and every or any of the salaries by this act, or the annuities by way of compensation by the said first-recited act, made payable, or any part of any such salary or annuity, shall and may be paid respectively on such days

Salaries to be paid on such days as the chancellor shall direct.

and by such yearly or other payments as in the said order or orders shall be specified ; and in case of the death, resignation, or removal of any of the officers or persons entitled to salaries or annuities as aforesaid, by the same or other order or orders to direct that the proportion of any salary or annuity payable as aforesaid which may become due to any officer or person as aforesaid between the time to which any such salary or annuity may have been then last paid or payable, and the time of any such death, resignation, or removal, shall be paid to the said officer or other person so resigning or being removed, his executors, administrators, or assigns, or to the executors or administrators of any officer or other such person so dying.

If the fund is not sufficient at any time then the securities to be sold.

XVI. And be it further enacted, that if at any time hereafter the whole or any part of the money placed out in pursuance of this act shall be wanted to answer any of the demands due in respect of the said bankrupts estates, then and in such case the said lord high chancellor may and shall direct the whole or any part of the securities in which the same may be placed to be sold and disposed of, and the money arising from such sale to be paid into the Bank of England in the name of the said accountant general in Chancery or the accountant in bankruptcy, in such manner as the said lord chancellor shall direct, in order that the demands due in respect of the said bankrupts estates may at all times be fully paid out of the common and general cash belonging to such estates.

Securities purchased may be changed.

XVII. And be it further enacted, that it shall be lawful for the lord high chancellor, by any order or orders, to authorize the change of the securities to be purchased pursuant to this act, or any part of the same.

Cash in the bank belonging to bankrupts estates to be one common and general cash.

XVIII. And to the end that no suitor or suitors of the said Court of Bankruptcy may be delayed in payment of any money due to him, her, or them, but that every one may receive his or her full demand whensoever he or she shall apply for the same, in the most easy and expeditious way ; be it enacted, that all the money and cash now deposited in the bank, or that shall at any time hereafter be paid into or deposited in the

bank, on the account of bankrupts estates or in any matter of bankruptcy, shall be and be accounted and taken to be one common and general cash, and shall be promiscuously issued and issuable for the answering, paying, and clearing the debts and demands thereon.

XIX. And be it further enacted, that out of the interest and dividends of the said government or parliamentary securities to be purchased as aforesaid the costs, charges, and expenses of all proceedings to be had under this act shall be paid by the governor and company of the Bank of England by virtue of any order of the said lord high chancellor.

Expenses of proceedings under this act to be paid out of the fund.

XX. Provided always, and be it further enacted, that if at any time hereafter the whole or any part of the money to be laid out in pursuance of this act shall be wanted to answer the demand of any bankrupts or their creditors or other persons interested therein, and the stocks, funds, and cash then standing in the name of the said accountant general in Chancery or the accountant in bankruptcy to the several accounts before mentioned and created by this act, or either of them, shall not be sufficient to answer and satisfy the said demands, then the same money taken for the purposes and by virtue of this act shall be and shall be considered a debt due from the public, and to such extent as may be necessary shall be answered and made good by parliament accordingly.

If money not sufficient for the purposes of this act, the same to be made good by parliament.

XXI. And whereas by the firstly herein-before recited act it is enacted that there shall be a chief judge and three other judges of the said Court of Bankruptcy, and that there shall be two registrars and eight deputy registrars of the said court : and whereas a vacancy having occurred by the death of one of such judges, such vacancy has not been supplied, and it appears that the duties of the said court may be effectually performed by the chief judge and two other judges ; be it therefore enacted, that hereafter there shall be only two judges of the said court other than the chief judge ; and it also appearing that upon the appointment hereby authorized being made of an accountant in bankruptcy, part of the duties now per-

Court in future to consist of one chief judge and two judges.

In the event of death or removal of a registrar vacancy to be supplied by deputy registrar acting under him.

formed by the chief registrar of the said court may be discharged by such accountant, so that the duties now performed by the two registrars and the two deputy registrars not attached to the commissioners of the said court may be discharged by two registrars and one deputy registrar; be it therefore enacted, that as and when any vacancy may occur by the death, removal, or retirement of any one of the said registrars, such vacancy shall be supplied by the deputy registrar acting under the registrar by whose death, removal, or retirement such vacancy shall occur; and that when any vacancy shall occur by the death, removal, or retirement of either of the said two last-mentioned deputy registrars, such vacancy shall not be supplied so as to provide altogether for more than two such registrars and one such deputy registrar, other than the six deputy registrars attached to the commissioners aforesaid; and it shall be lawful for the Court of Review, when and as any such vacancy shall occur, to make such general orders as to the duties to be performed by such registrars and deputy registrar as they shall think fit.

Annual returns to parliament.

XXII. And be it enacted, that within two months from the first day of January in every year returns shall be presented to parliament, if then sitting, and if not, then within one month after parliament shall have assembled, by the said accountant general of the Court of Chancery or the accountant in bankruptcy (as the case may be), of the net amounts at the credit of the said accountant on the said first day of January on each of the following distinct accounts, which returns shall respectively specify the amount transferred and paid out as dividends, and the amount paid by orders of court or of the judges, and shall also show the unappropriated balance then existing on each account; videlicet, first, the bankruptcy fund account; second, the interest arising from the bankruptcy fund account; third, the unclaimed dividend account; fourth, the secretary of bankrupts account; fifth, the secretary of bankrupts compensation account; the fourth and fifth of such accounts to have appendixes attached to them, detailing all payments made from such accounts, and to whom made, and whether as salaries, compensations, or other allowances.

XXIII. And whereas by the said first-recited act it is enacted, that the six commissioners therein mentioned may be formed into two subdivision courts, consisting of three commissioners for each court, for the purposes therein mentioned; and that all references and adjournments by a single commissioner to a subdivision court by virtue of the said act shall be to the subdivision court to which he belongs, unless the said commissioner, in case of the sickness of some one or more of the commissioners of such subdivision court, or for other sufficient cause, shall think fit otherwise to direct: be it enacted, that in case of the non-attendance of any one or more of the commissioners of either of the said subdivision courts, to be duly summoned for that purpose, the reference shall not be of necessity to the other subdivision court, but it shall and may be lawful for the remaining commissioner or commissioners of such subdivision court to call in and require the attendance of either or any of the commissioners of the other of the said subdivision courts, and that such commissioners may form a subdivision court for the purposes of the said recited act as fully and effectually as either of the two subdivision courts so now authorized to be formed as aforesaid.

Mode of forming subdivision courts in case of non-attendance of any commissioners of the division to which cause is referred.

XXIV. And be it enacted, that the said Court of Review and either of the said subdivision courts, and also any judge or commissioner of the Court of Bankruptcy, shall have power to administer oaths on affidavits to be sworn before them respectively in matters of bankruptcy, in all cases where the same may be administered by a master in ordinary or extraordinary of the High Court of Chancery, and to take for every such oath, except where such oath shall be administered to an affidavit entitled in the Court of Bankruptcy or in the Court of Review, the fee of one shilling and sixpence, which said fee shall be payable and paid accordingly; and that all such fees shall be accounted for and paid over to the chief registrar of the said Court of Bankruptcy, and be carried to the account of the second schedule of fees annexed to the said first-recited act, and be applied to the purposes of the said schedule.

Power given to courts to administer oaths on affidavits.

Fees.

Court of Review and subdivision courts declared to have been courts of record from the passing of 1 & 2 W. 4. c. 56.

XXV. And whereas doubts have been entertained whether, by the terms of the said first-recited act, the said Court of Review and subdivision courts have been effectually made courts of record; and whether the said courts have upon an examination before them the same powers of commitment for the purpose of enforcing discovery as were vested in commissioners of bankrupt under the acts of parliament relating to bankrupts in force at the time of the passing of the said first-recited act; and it is expedient that such doubts be removed, and that such powers as are hereinafter mentioned should be given to the several judges and commissioners acting under the authority of the said first-recited act; be it enacted, and it is hereby declared, that the said Court of Review and the said several subdivision courts respectively shall henceforth be, and shall be deemed and taken, from and after the passing of the said first-recited act, to have been courts of record, and shall and may have and exercise all such powers of commitment as were vested in commissioners of bankrupt, acting as such at the time of the passing of the said first-recited act, and shall and may have, use, and exercise all the powers, rights, privileges, and incidents of a court of record, as fully to all intents and purposes as the same are used, exercised, and enjoyed by any of his Majesty's courts of law at Westminster; and all orders heretofore pronounced, and all acts done by the said Court of Review and subdivision courts respectively, shall be deemed and taken to have been pronounced and done by the said courts respectively as courts of record; and every judge or commissioner appointed or to be appointed by virtue of the said first-recited act sitting alone and acting in execution of the duties imposed upon him as such judge or commissioner, shall have, use, exercise, and enjoy all the powers, rights, privileges, and exemptions of a court of record: provided always, that nothing herein contained shall be deemed or taken to authorize or empower any such judge or commissioner sitting alone to impose any fine or commit for a contempt of court, but every contempt of any such judge or commissioner sitting alone and acting as aforesaid shall be cognizable by the said Court of Review, to which the same

may be referred by any such judge or commissioner as aforesaid; and the said Court of Review shall have full power to deal with the same as a contempt of the said Court of Review: provided also, that nothing herein contained shall be deemed or taken to diminish or effect the power by the said first-recited act given to any such judge or commissioner of committing any person examined before him to any messenger or other officer of the Court of Bankruptcy.

XXVI. And be it further enacted, that the powers and authorities given by this act to the lord high chancellor shall and may be exercised in like manner and are hereby given to the lord keeper or lords commissioners for the custody of the great seal respectively for the time being. As to the exercise of the powers given by this act.

XXVII. And be it further enacted, that this act may be altered, varied, or repealed by any act to be passed in this session. Act may be altered in present session.

XXVIII. And be it further enacted, that this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded. Public act.

NEW ORDERS

MADE BY THE

LORDS COMMISSIONERS.

Order for Payments to the Bank.

Saturday, 31st October 1835.

Lords Commissioners,

In the matter of bankruptcy.

WHEREAS by an order of the Court of Review, dated the 12th day of January, 1832, it was ordered that each official assignee shall pay into the Bank of England, to the credit of the accountant-general of the High Court of Chancery, all such sums of money as shall come to his hands, as soon as they shall amount to 100*l.*; and at the time of paying in such monies shall state in writing, delivered therewith to the cashier of the Bank of England, the date and the amount of the payment, the name of the official assignee making it, the name and description of the bankrupt or bankrupts, and the particular estate to which the money belongs, and that it is to be placed to the credit of the said accountant-general, and of such particular estate, and shall take a receipt for the same from the cashier of the Bank, and carry it to the office of the accountant-general, who will give a proper voucher for such receipt, such voucher to be produced when called for by the commissioner.

We do order that the above-recited order be altered, and that from henceforth the order be as follows :

That each official assignee shall pay into the Bank of England, to the credit of the accountant in bankruptcy, all such sums of money as shall come to his hands, as soon as they shall amount to 100*l.*, and at the time of paying in such monies shall state in writing, delivered therewith to the cashier of the Bank of England, the date and the amount of

the payment, the name of the official assignee making it, the name and the description of the bankrupt or bankrupts, and the particular estate to which the money belongs, and that it is to be placed to the credit of the said accountant in bankruptcy, and of such particular estate; and the official assignee shall take a receipt for the same from the cashier of the Bank, and carry it to the office of the accountant in bankruptcy, who will give a proper voucher for such receipt, and that the money is placed to the credit of the estate of the said bankrupt, in the books kept in the office of the accountant in bankruptcy.

C. C. PREYER, C. S.

L. SHADWELL, C. S.

J. B. BOSANQUET, C. S.

Order for Payment by the Bank.

Saturday, 31st October 1835.

Lords Commissioners.

In the matter of bankruptcy.

WHEREAS by an order of the Court of Review, dated the 19th day of March 1832, it was ordered that all sums of money, which are by law payable out of any bankrupt's estate for allowance to the bankrupt, or for remuneration to the official assignee, or for the discharge of the solicitor's bill, or of any other lawful expences incurred or payable by the assignees, shall and may, when duly settled and allowed, be paid out of the monies and securities so delivered and paid into the Bank of England as aforesaid, at such times, and in such manner, as any one of the judges of this court shall by order under his hand direct; provided that such order specify the amount of such payment, the purpose to which it is to be applied, and the person to whom or to whose order the same is to be made; and the accountant-general of the High Court of Chancery shall and may, pursuant to such order, pay the sum of money specified therein out of such bankrupt's estate, without any further evidence of the same being due and payable, and without any further order or direction from this court.

We do order that the above-recited order be altered, and that from henceforth the order be as follows :

That all sums of money, which are by law payable out of any bankrupt's estate for allowance to the bankrupt, or for remuneration to the official assignee, or for the discharge of the solicitor's bill, or of any other lawful expences incurred or payable by the assignees, shall and may, when duly settled and allowed, be paid out of the monies and securities so delivered and paid into the Bank of England as aforesaid, at such times, and in such manner, as any one of the commissioners shall by order under his hand, testified by a deputy registrar, direct ; provided that such order specify the amount of such payment, the purpose to which it is to be applied, and the person to whom or to whose order the same is to be made ; and the accountant in bankruptcy shall and may, pursuant to such order, pay the sum of money specified therein out of such bankrupt's estate, by a draft subscribed to and on the same paper with the said order.

C. C. PEPYS, C. S.

L. SHADWELL, C. S.

J. B. BOSANQUET, C. S.

Order as to Exchequer Bills.

Saturday, 31st October 1835.

Lords Commissioners.

In the matter of bankruptcy.

WHEREAS by an order of the Court of Review, dated the 10th day of March 1832, it was ordered that any one of the judges of the Court of Bankruptcy may, as often as it shall appear to him expedient, by order under his hand, direct any money which may have been paid into the Bank of England by any official assignee to the credit of the bankrupt's estate, to be invested in the purchase of exchequer bills ; and may, in like manner, direct the sale or exchange of such exchequer bills, and also the exchange, sale, and transfer of any stock in the public funds, or in any public company, or

of any exchequer bills, India bonds, or other public securities, which shall have been transferred, delivered, or paid by any official assignee into the Bank of England to the credit of such estate, and may direct the proceeds thereof to be laid out in the purchase of exchequer bills, to be carried to the credit of the accountant-general of the High Court of Chancery, shall and may, pursuant to such order, make such purchase, sale, and transfer, without any further order or direction from this court, and the expences thereof may be charged to the account of the estate, for the benefit of which the same shall have been respectively made.

We do order that the above-recited order be altered, and that from henceforth the order be as follows :

That any one of the Commissioners of the Court of Bankruptcy may, as often as it shall appear to him expedient, by order under his hand, direct any money which may have been paid into the Bank of England by any official assignee on account of any bankrupt's estate, to be invested in the purchase of exchequer bills to be lodged in the Bank of England, and may, in like manner, direct the sale or exchange of such exchequer bills ; and also the exchange, sale, and transfer of any stock in the public funds, or in any public company, or of any exchequer bills, India bonds, or other public securities, which shall have been transferred, delivered, or paid by any official assignee into the Bank of England on account of any bankrupt's estate, and may direct the proceeds thereof to be laid out in the purchase of exchequer bills, to the credit of the said accountant in bankruptcy, and that such exchequer bills when so purchased be deposited in the Bank of England, to the credit of the said accountant, and of such particular estate ; and the said accountant shall and may, pursuant to such order, make such purchase, sale, and transfer, without any further order or direction, and the expences thereof may be charged to the account of the estate, for the benefit of which the same shall have been respectively made : provided always, that the signature of the commissioner be attested by a deputy registrar, and that the order of the accountant in bankruptcy be subscribed to the order of the commissioner, and on the same paper with the said order. Provided further,

that no stock or public fund be transferred upon any sale, and that no exchequer bill, India bond, or other public security, be delivered for the purposes of a sale, except to a cashier of the Bank of England, until the price or value thereof be paid into the Bank of England to the credit of the accountant in bankruptcy, and of the particular estate to which it belongs, and that no sum be paid for the purchase of any exchequer bill, India bond, or other public security, until such exchequer bill, India bond, or public security be deposited in the Bank of England, to the credit of the said accountant in bankruptcy, and of the particular estate.

C. C. PEPPY, C. S.

L. SHADWELL, C. S.

J. B. BOSANQUET, C. S.

31st October 1835.

Lords Commissioners.

In the matter of bankruptcy.

WHEREAS by an order of the Court of Review, bearing date the 28th day of March 1832, various provisions were made respecting the payment of dividends, and the payment and re-investment of exchequer bills; which order it is expedient to alter.

We do therefore order, that the said order of the 28th day of March 1832, be rescinded, and that instead thereof the order be as follows; that is to say:

First, When a dividend has been or may be declared, the solicitor to the estate shall forthwith make out three lists of the creditors, in alphabetical order; and shall state in separate columns, after the name of each creditor, the amount of his debt and the dividend to which he is entitled, and in two of such lists the securities exhibited at the time of proof; and shall to each name prefix a number in regular series, together with the date of the order of the dividend, and the date of his signature, according to the forms in the Schedule (A.) hereunto annexed; and the solicitor shall cause one of such lists which specifies such securities to be filed with the

proceedings, and the other of such lists which specifies the securities he shall deliver to the assignees chosen by the creditors, or such one or more of the assignees as the commissioners shall direct.

Secondly, When the list is delivered by the solicitor to the creditors' assignees or assignee, such assignees or assignee shall examine such list, and, as far as it is correct, sign and return the same to the solicitor.

Thirdly, Upon the receipt of the list from the creditors' assignees, the solicitor shall deliver it to the official assignee, together with the list not specifying the securities, and the official assignee shall examine and sign the list, if correct; and shall prepare books at the expense of the estate, containing as many blank drafts as may be necessary, and shall number and fill up a draft for each dividend, and insert in each draft the name of the creditor to which the number of such draft is prefixed in the list, and the dividend payable to him, and shall keep the list specifying the securities in his custody; and shall take the books containing such drafts, together with the list not specifying the securities, to the Accountant in Bankruptcy, who shall ascertain that the amount of such drafts does not exceed the sum standing in his name to the credit of the bankrupt's estate, and shall compare the drafts with the lists, and, as far as they are correct, shall sign the drafts in the books; and he shall keep in his custody the list of creditors, and return the drafts to the official assignee, by whom they shall be countersigned according to the form in Schedule (B.) appended to these orders; and the cashiers of the Bank shall pay such drafts out of the monies standing to the credit of the account entitled the "Bankrupt Dividend Account."

Fourthly, And it is further ordered, that if, after such list shall have been so deposited with the said accountant, it shall from any cause seem expedient to the commissioner that such drafts shall be altered, the said commissioner may order such alterations as to him may seem just, or may direct a new list to be made and new drafts to be drawn, and the old drafts cancelled; and such altered or new drafts shall be

filled up and signed, and paid in the manner hereinbefore directed.

Fifthly, When a dividend has been or may be declared under any fiat or commission, and where any part of the bankrupt's estate shall have been paid into the Bank of England by any official assignee, any one of the Commissioners of the Court of Bankruptcy may, by order under his hand, direct the sum ordered to be divided, or such parts thereof as may be required, to be carried over from the general account standing in the Bank of England in the name of the Accountant in Bankruptcy, and of such particular estate, to the account kept in the Bank of England entitled the "Bankrupt Dividend Account:" and it is further ordered, that when it shall appear that any part of the money directed to be applied in payment of any dividend is not called for to make such payment, the Commissioner may, by order under his hand, direct such sum to be carried back to the general account, and of the particular estate to which it belongs; and the same shall thereupon be carried back accordingly, and a certificate of such transfer shall be sent to the office of the Accountant in Bankruptcy.

Sixthly, Upon the death, sickness, or unavoidable absence of the Accountant in Bankruptcy, or of any official assignee, any two of the Commissioners may, by order under their hands, make such order as to them may seem expedient to carry the aforesaid orders into effect; provided that such order be confirmed by the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal, or by some one Judge of the Court of Review.

Seventhly, When a creditor, or any person duly authorized under his hand to receive his dividend, shall apply for payment, the official assignee shall require the production of such securities, if any, as the creditor exhibited at the time of his proof; and if satisfied that the amount of the said dividend still remains due, shall fill up the date in the draft and receipt; and upon the creditor, or such other person authorized as aforesaid, signing the receipt for such dividend, the official assignee shall mark the securities (if any) with

the amounts of that dividend, and shall sign and deliver the draft for the same; provided that no dividend shall be paid to any creditor holding any security for his debt, until such security shall be produced, without the special directions of a Commissioner in that behalf.

C. C. PEPYS, C. S.

L. SHADWELL, C. S.

J. B. BOSANQUET, C. S.

SCHEDULE (A.)—FORM I.

Of which two copies are to be provided by the solicitor, one to be filed with the proceedings, and one delivered by him to the official assignee, who is to keep the same.

In the matter of a bankrupt.

Before Mr. Commissioner

Creditors assignees,

Official assignee,

Solicitor,

Dividend,

Declared amount,

No.	Creditors. To be placed alphabetically, and the names of the parties to the proof to be carefully set forth.	Residence and Description.	Proofs.	Claims.	Dividends.	Bills and Securities exhibited.			Sam.
						Date of Bill or Note.	Drawer.	Acceptor.	Indorser.

Solicitor.
day of 189

FORM II.

Of which one copy is to be provided by the solicitor, and to be delivered by him to the official assignee, together with the former list, after it has been examined by the creditors assignee.

In the matter of
a bankrupt.

Before Mr. Commissioner

Creditors assignees,
Official assignee,
Solicitor,
Dividend,

Declared amount.

No.	Creditors. To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.	Proofs.	Claims.	Dividends.

Solicitor. 183
day of

SCHEDULE (B.)

£ Bankrupt Dividend Account, No.

Estate of bankrupts.

Fifth dividend

Pay to

London,

or bearer, the sum of

Accountant.

Official Assignee.

To the cashiers of the Bank of England.

N. B. This draft must be indorsed by the payee.

1835.

Ex parte EDWARD LOWE SIDEBOTHAM, Assignee, and
GEORGE BUCK and JOHN ALLCOCK, Executors of
SAMUEL BUCK, and JOSEPH DYKES.—In the matter of
WILLIAM BARRINGTON.

THIS petition (as in the case of a similar name reported *ante*, Vol. III. p. 818; and 1 *Mont. & A.* 665, (a)) sought the specific performance of a contract for the purchase of premises sold under Lord *Loughborough's* general order of 8th March 1794. The subject of it was a distinct lot from that which gave rise to the case above alluded to; but the purchaser (the respondent) being the same as of the other lot, the circumstances of this case were similar, except in such particulars of variance as will be collected from the arguments of the counsel for the respondent.

The counsel for the petitioners, Mr. *Spanston* and Mr. *Teed*, contended that the two cases were in nowise to be distinguished, and therefore, without repeating the arguments, relied on the former decision as entitling the petitioners to a similar order.

Mr. *Bethell* and Mr. *Rogers*, for the respondent. Without repeating the arguments used by the counsel for the respondent on the former occasion, we beg to refer the Court to them as they are now in print, and to claim the full benefit of them; especially as in this case

(a) See also that case on appeal, 4 Dea. & Chit. 461.

ing a lease of the premises purchased by him before the title to him was completed. *Quere*, whether this Court has jurisdiction to direct specific performance of contract of purchase of bankrupt's property, where the purchaser did not know, and had no means of knowing, that the sale took place under order of this Court or of Commissioners?

March 9 & 11. Specific performance of sale under Lord *Loughborough's* order decreed by this Court, although the following objections were urged: viz. 1st. That particulars of sale did not state that sale took place under order of Court; it appearing that purchaser must have known the fact that it was so. 2d. That a third mortgage of equity of redemption and an assignee on prior insolvency of bankrupt were not parties. 3d. Though the petitioning creditor's debt on which this fiat was founded was contained in the schedule in prior insolvency; especially as the purchaser was presumed to have known of all the objections to the title, and was held to have waived them by grant-

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there are such additional circumstances as will, we think, induce the Court to arrive at a decision in our favour. In order to give jurisdiction to this Court to decree specific performance, it is attempted by the petitioners to be shown that the sale took place under the order of the Court. In the former case, the particulars stated that the sale of that portion of the property which gave rise to it was under the order of the Commissioners. But not so in the present case: as regards the subject of this petition, nothing existed in the particulars to show that the purchaser was about to become purchaser from the Court, or that in fact it was a judicial sale. To render a party liable as a purchaser from the Court, it ought at least to be shown that he bid with his eyes open to the fact of his rendering himself amenable to the peculiar responsibilities which a purchaser of that nature is subject to. The party respondent now before the Court might have been, and for all that appears to the contrary was, wholly ignorant of that fact, the particulars not even stating that it was part of the bankrupt's estate that was to be sold.

Getting rid, however, of that objection, there are others in this case of a far more formidable nature. Parties are wanting here, without whom this Court cannot give a perfect title to the respondent, in the event of their assuming jurisdiction to make the order for specific performance. The premises in question were originally mortgaged in 1822 to *Dykes*. The mortgage deed conveyed to him the legal estate. A second mortgage was made to the testator *Buck* in 1825. A third mortgage, subject to the prior ones, was made to *Skirrett*, which conveyed all the equity of redemption to him. *Dykes* and the executors of *Buck* are before the Court, but *Skirrett* is not: and it is clear from the case of *Ex parte Jackson* (a), that the

Court has no power in his absence to order him to join in the conveyance. And unless he can be induced to do so, it is obvious that no perfect title can be given to the purchaser.

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Again, the attention of the Court should be called to the circumstance of the insolvency of *Barrington*, the facts of which were fully before the Court in the former case. It is indisputable that all the interest which *Barrington* had in the property in question passed to the provisional assignee under the insolvency; and be that interest great or small, this Court can make no order touching it in the absence of the provisional assignee; otherwise the Court will be taking upon itself to declare the insolvency altogether a nullity. We, however, on the contrary contend that, not the insolvency, but, that this fiat is altogether invalid. No commission or fiat was issued within the time limited by the act of parliament; but the insolvency proceedings advanced uninterruptedly in the usual way; and when we look at the insolvent's schedule, we find the very debt upon which this fiat is founded inserted therein. We are aware of the decision of the case of *Jellis v. Mountford*(a), wherein it was held, that although a debt was inserted in an insolvent's schedule, yet it might form the basis of a commission of bankruptcy. That decision is, we venture to say, very questionable; it is not a decision that has met with the approbation of the bar; and although opportunities must have arisen frequently since, for a confirmation of the doctrine there laid down, yet in no one case has that decision been followed. The commission is, we contend, upon this ground a nullity. And, indeed, a petition to supersede it is at this moment pending before the Lord

(a) 4 Bar. & Ald. 256.

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Chancellor. [Sir G. Rose. Whatever objections you may have to urge against this fiat, this is not the proper mode or opportunity of doing so. Although it might ultimately turn out to be worth not one farthing, yet it is our duty to treat it in every way as effective, until it is *de facto* superseded, or at all events till a petition is presented to this Court for that purpose. We can take no notice judicially of the pendency of any petition which may be presented before another tribunal, so long as it is merely pending. I think the best answer to that which is advanced on behalf of the respondent is, that all objections which he might at one time have urged against the right now sought by the petition, have been waived and abandoned by the mode in which the respondent has dealt with the property in question. It seems impossible to deny that the respondent took possession with a full knowledge of all those facts, on which he now seeks to found his objections to the specific performance.] We say our taking possession was only conditional. It occurred at a time when all the objections were under consideration of counsel, and there is nothing to show any actual intention to abandon them. The objection to the validity of the commission is such that it is impossible it can be abandoned. If it is a valid objection, it cuts at the very root of the relief now sought; for it cannot be urged that we should be compelled to perform that which the next moment the Court may, by upsetting the commission, declare to be impossible. What too is the circumstance relied on by the petitioners as amounting to a waiver? The mere fact that the respondent had agreed with another party to grant him a lease. This, at most, amounts to an indication of the intention to complete the purchase, provided a proper title should be made. No case has gone so far as it is sought to carry this. The question

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of title was pending before and for several weeks subsequent to the agreement for the lease ; therefore there could have been no intention on our part to waive such objections to title. [Sir J. Cross. Did not the respondents at that time know the fact of the insolvency?] Yes, but it was still a question in dispute, and at most he evinced an intention to take only if a good title could be established. The case of *Ex parte Gould*, (a) which is the only one wherein specific performance has been directed in bankruptcy, is at most an *ex parte* case, for the purchaser did not appear at the hearing. Specific performance is always discretionary, and we trust that in a case of such doubt as the present, the Court will hardly think fit to pronounce an order for the petitioners.

The Court did not require any reply.

ERSKINE, C. J.—It seems to me to be quite clear that this sale, in fact, took place under the order of the Court, as in the last case ; for although the particulars applicable to this lot do not expressly so state, yet the sale took place at the same time and place when and where the former portion of the property was sold ; and it is manifest from all the circumstances that the respondent was fully acquainted with the fact of its being so, which removes all doubt of our jurisdiction from my mind. The other objections made to this application are, that the assignees have no power to sell, and in fact, nothing but a mere shadow to dispose of ; having, as alleged, no title to the property in question ; first, because the commission is invalid, owing to the prior insolvency of *Barrington*, and the insertion of the petitioning creditor's debt in the insolvent's schedule ; and secondly, because the equity of redemption is either in *Skirrett* or in the provisional assignee in in-

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(a) 1 Glyn. & J. 281.

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solvency, neither of whom is brought before this Court. Whether these objections are well founded or not, they were well known to the respondent at the time of the sale, or at least prior to the time when he ceased to treat the sale as binding on him. We can hardly presume him to have been ignorant of the most trifling circumstance, considering that he stands in the relation of son to the bankrupt. But as to the invalidity of the commission, I cannot see that any sufficient argument or circumstance has been brought forward to induce us to regard it so. It is attempted to be made out, by showing that the petitioning creditor's debt is contained in the schedule on the insolvency; but we must regard it as established, that that forms no objection. The debt is not gone at law. The case of *Jellis v. Mountford* (a), is precisely in point, and I see no reason to question that decision. There is no doubt (and Lord *Tenterden*, in the case of *Jellis v. Mountford*, so lays it down) that in a proper case, and if the estate could be as well administered under the insolvency as in this Court, the fiat might be superseded, that being always a question of discretion. But it by no means follows that, upon the bare fact of the prior insolvency, the Lord Chancellor will supersede as a matter of course. The objections made to the title are not, I think, very serious ones. A willing purchaser, knowing all the circumstances, would view them as unimportant, and would waive them: and it strikes me, that, under all the circumstances, the Commissioners of the Insolvent Debtors' Court would, under the 11 Geo. 4. & 1 Will. 4. c. 38. s. 5. (b) order the insol-

(a) 4 Barn. & Ald. 256.

(b) "And whereas it may often happen that some interest in lands and tenements may become vested in the provisional assignee of the said Court, which appears to be of no value to creditors, but nevertheless it may be reasonable and expedient that the said provisional assignee should make or

vent's assignee to join in the conveyance now resisted, because the interest appears of no value to the creditors.

Having shown that in all probability the objections now made *might* have been waived, let us see if, in point of fact, they were waived? In October 1833 these objections were raised to the purchase of other property, and a case was laid before counsel for an opinion. It has been said that the opinion which should be given, was intended to decide as to the purchase of the property now in question also. It is said such was the understanding of the parties. But there is nothing more to show that any agreement of the kind was come to. The letter in October was prior to the lease to *Arden*, and that letter for the time closed the negotiation. Upon looking at the case which was laid before counsel, it seems that it had nothing to do with the property now in question. Looking at all the facts, I can arrive at no other conclusion than that the respondent intended to waive all objections, and did accept the title. The lease he made to *Arden* is the main circumstance on which I rely. That, it was at one time said, contained a clause rendering it a nullity if a good title could not be granted by the assignees. But on looking at it, it turns out to be a mere ordinary lease

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join in making some conveyance or assignment of the same, and that the same should be done without the expense attending advertisements and meetings of creditors, as prescribed by the said first-mentioned Act in certain cases; be it therefore enacted, that it shall and may be lawful for the said Court, at any time after the day gazetted for the hearing of the matters of the petition of any insolvent debtor, if no creditor shall have become assignee of his or her estate and effects, and if it shall appear fit, upon such notice given by advertisement or otherwise to the creditors or any of them as the said Court shall in any case direct, to order the said provisional assignee to make or join in making any conveyance or assignment of any such interest as to the said Court may appear just and reasonable, without observing the provisions of the said first-mentioned Act as to the sale of real property by the provisional or other assignees of the estates of insolvent debtors."

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devoid of any such terms. The same order must therefore be made as in the former case.

Sir J. CROSS.—If this purchaser would be subjected to any real loss by the order we feel inclined to make, I for one should scruple before I declared him to have waived the objections to the title. But it is very manifest he will not. Prior to that of *Skirrett*, there are two mortgages to be paid off out of the purchase-money, the sufficiency of which for that purpose is very questionable. *Skirrett* can have little or no beneficial interest at issue on this petition. With respect to the objections which are urged against the title, are they objections manifested merely by the abstract? Certainly not: they were perfectly as well known, and fully as latent at the time of the purchase as they are now; and it seems to me evident, that the purchaser never at that time intended to avail himself of them. He well knew of *Skirrett's* mortgage, and of course was aware of his father's insolvency. I can see no difference in the circumstances of this case and the former one.

Sir G. ROSE.—Prior to the institution of our jurisdiction, the Lord Chancellor had power to enforce all orders in bankruptcy. All the authority which he had is transferred to this Court, and I see nothing calculated to prevent us from legally enforcing an order of sale by the Commissioners, which must be taken to be an order by this Court, under which a party has been declared the best bidder, and therefore the purchaser. When the former petition came on, I said that this was the first contested case in bankruptcy of which I was aware, and I intimated that we could not exercise a more useful

jurisdiction than that of directing performance and completion of such purchases, and pointed out the great evil which would arise should we repudiate such power, driving the parties to all the expense and delay of a suit in equity. Fortunately, however, this power cannot be said to rest merely on principle; for in the case of *Ex parte Gould* (a) we have a precedent to guide us. In the former petition the rights of the petitioners were somewhat less ambiguous than in this; because in this a question might be raised, whether this sale was to be treated as made under an order in bankruptcy, binding as such on the purchaser, and as though it took place on a specific order on petition for sale. If the assignees acting in reality under an order, had so conducted matters as that the party bidding could not or did not know he was bidding and rendering himself liable as a purchaser from the Court of Bankruptcy, it might be very fairly put whether we had jurisdiction to enforce the sale,—whether, in fact, any contract had been entered into giving the Court power over the purchaser. Here the assignees, in not sufficiently describing the circumstances under which the sale took place in the particulars relating to the property, which is the subject of this petition, were certainly guilty of great neglect. But I think we are relieved from having to consider such a right, since the respondent has not properly put in issue the question whether it was a sale in bankruptcy. It is beyond a doubt that it was a sale of that nature, and moreover, that the respondent was fully aware of its being so. Otherwise, as courts of equity always proceed upon the special equities of the parties in cases of enforcing specific performance, we might in the exercise of our discretion have refused it in this case.

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(a) 1 Glyn & J. 231.

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The purchaser very properly contends, that he has a right to a perfect title, and to an investigation into it, before he is ordered to complete his purchase. But circumstances may have happened to debar him of that right. The bare fact of taking possession has over and over again been held not to be a waiver of objections to title; it is only a circumstance, and even had the lease been granted by him under protest, it would not have affected him. If on the production of the lease, or of any other *bonâ fide* document, it had appeared to have been provided that the operation of it should be dependant upon the validity of the title to be given to the lessor, no equity would arise thereout against the present respondent. But on its production, it appears to be nothing more than a common ordinary lease, without any provision of that nature. Looking then at all the circumstances, it is manifest that the respondent was fully aware of all objections to title, and that he intended to waive them. The case and opinion related to other matters, and could have no weight on his mind as regarded the completion of this purchase. The purchase money is merely equivalent, and I can see nothing so bad in the title itself to warrant our exercising any special favour towards the respondent. Would any Court, under all the circumstances surrounding the bankrupt's property, supersede this commission? Certainly not. I regard *Skirrett's* interest, especially as it is merely equitable, as nothing in the scale. The provisional assignee might with him be also ordered to convey, both being trustees in naked trusts. The bankrupt might of course be ordered to convey under the statute (a), and I feel convinced that neither in the Master's office nor in the

(a) 6 Geo. 4. c. 16: s. 78.

Exchequer would the objections now set up be allowed to prevail. There must, I am satisfied, be some covert reasons why this resistance is made, for those which are apparent are almost frivolous.

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The Court pronounced the same order as on the former case (a).

(a) Vol. iii. p. 818.

Ex parte A. B. BELCHER, J. BANNATYNE, and H. G. GORDON, Assignees.—In the matter of JOHN MABERLY.

THIS petition stated, that by an indenture of four parts, bearing date the 11th of March 1813, between the bankrupt *Maberly* of the first part, *James Baillie* of the second part, *Ann Baillie* of the third part, and *William Leader*, since deceased, and *John Masterman*, *John Smith*, and *John Irving*, Esquires, of the fourth part. After reciting, among other things, that a marriage had been agreed upon, and was intended shortly to be had and solemnized between the bankrupt and *Ann Baillie*, and that, upon the treaty for the said intended marriage, the bankrupt had agreed to secure the payment of fifteen thousand pounds to certain trustees, upon certain trusts thereafter mentioned, by the bond or obligation and covenant of the bankrupt, and by a term for years to be created in the hereditaments thereafter mentioned; it was witnessed, that the bankrupt did grant, bargain, sell, and demise unto the said *William Leader*, *John Master-*

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Where real property "with its appurtenances" (without other evidence of intention) was mortgaged by the owner of the fee, articles of furniture, as rolling maps, affixed before and after the mortgage to the freehold, although they might have been removable as between a landlord and tenant, and although he continued in possession up to the time of his bankruptcy, passed by the mortgage and were taken out of the order and disposition of the bankrupt owner.

Whatever is affixed to freehold by the owner of the inheritance is to be considered as a fixture till severed by him; and whether so affixed before or after a mortgage, passes absolutely to the mortgagee.

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man, John Smith, and John Irving, among other lands and hereditaments therein particularly mentioned, all that capital messuage or tenement called Shirley House, with the coach-houses, stables, and other outbuildings, lawn, gardens, and pleasure grounds thereunto belonging or therewith held, containing, together with the site of the house and outbuildings, fourteen acres, three roods, and seven perches, save and except such small part of the said lawn as was held by copy of court roll of the manor of Croydon, and which was theretofore surrendered to the use of the said John Maberly. And also all that piece or parcel of land called The Park, containing sixty-three acres and nine perches, together with the messuage or tenement, and outbuildings, standing and being at the south end or side thereof, and commonly called or known by the name of Shirley Cottage, (save and except such small parts of the said piece or parcel of land as were held by copy of court roll, and which had been surrendered to the use of the said John Maberly;) all which said messuages or tenements, lands, hereditaments, and premises therein particularly described, were situate in Shirley and Addiscombe; in the parish of Croydon, in the county of Surrey; and were in the said indenture stated to be, together with the said copyhold hereditaments and premises, demised by John Maberly, by two indentures, dated respectively the 1st day of November 1804, and the 21st day of July 1808, and to be in the occupation of the said John Maberly or his under-tenants. And all other the messuages, cottages, lands, tenements, tithes, and hereditaments whatsoever, lying, being, or arising within the said county of Surrey, whereof the said John Claxton was seised in fee simple in law or equity at the time of his decease, and their and every of their appur-

tenances, and of or to which the said *John Maberly*, or any person or persons in trust for him, was or were seised for any estate of freehold or inheritance, to hold the same, *with their appurtenances*, unto the said *William Leader*, *John Masterman*, *John Smith*, and *John Irving*, their executors, administrators, and assigns, for a term of five hundred years, subject to a proviso for redemption upon payment of the said sum of 15,000*l.*, with interest at the rate of five per cent. upon the 11th day of September then next ensuing.

The petition went on to state, that the whole of the said principal money, together with a large arrear of interest, remained due. The bankrupt, down to the time of his bankruptcy, continued himself in possession of the messuage called Shirley House, and all other the premises, with the exception of the messuage called Shirley Cottage, which he had before his bankruptcy let, with the furniture upon the same, to *James William Farrer*, as a yearly tenant; and the messuage and premises which were in possession of the bankrupt came into, and have ever since continued in the possession of the petitioners. The fiat issued the 26th of January 1832, and the petitioner *Alexander Brymer Belcher* was appointed official assignee, and the petitioners *John Bannatyne* and *Harry George Gordon* were chosen the assignees. The whole of the premises were sold, together with the fixtures, without prejudice to the question as to whom such fixtures belonged. And the fixtures in and upon the messuage and premises called Shirley House were valued at 712*l.* 13*s.*; and those in or upon the messuage and premises called Shirley Cottage, at 113*l.* 14*s.*; both which sums were about to be paid over by the purchasers of the said premises to the joint order

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of the petitioners and the said trustees, until it was ascertained which of them were entitled thereto. The trustees insisted that the whole of the fixtures and other articles were comprised in their mortgage, and therefore claimed to be entitled to receive both the sums of 712*l.* 18*s.* and 118*l.* 14*s.* in part of the principal and interest due to them, which the proceeds of the whole of the mortgaged premises would be insufficient to discharge, and they would have to come in as creditors for the deficiency under the fiat. The petitioners, on the other hand, insisted that the fixtures and other articles were not so comprised, or that if they were, yet that all such of the fixtures as are commonly distinguished or known as tenants' fixtures, and the other articles which were not fixtures, passed to them, as having been in the possession, order, or disposition of the bankrupt at the time of his bankruptcy: and the petition therefore prayed a declaration to that effect, and that the 712*l.* 18*s.* and 118*l.* 14*s.* should be accordingly paid over to the assignees for the benefit of the general creditors. From the affidavits it further appeared, that subsequent to the mortgage, the bankrupt had affixed fresh articles to several parts of the premises, and among them (and on which some question as to their being fixtures arose) were some roller maps, which were in mahogany frames, such frames being so affixed to the walls as not to be removable without some trifling damage thereto: also iron fence hurdles, which were put round groups of trees for their permanent protection against cattle. It also appeared that the *Duke of Richmond* had occupied the house, without paying or being chargeable for any rent, for a short time previous to and up to the time of the bankruptcy.

Mr. Swanston and Mr. Montagu, for the petitioners. In the first place, we contend that nothing in the nature of fixtures passed to the trustees under this mortgage deed, and certainly not those which were placed on the premises after the execution of the deed, and remained in the possession of the bankrupt up to the time of the bankruptcy. For the possession of the *Duke of Richmond* cannot be regarded as that of a tenant, but must be considered as being the holding of an agent for the bankrupt. Unless the mortgage deed shows an intention that such things as fixtures should pass, the Court cannot hold the mortgagee entitled to them. In the case of *Trappes v. Harter*(a), the Court proceeded upon the question of the intention of the parties, and there, though the words of the mortgage deed were sufficient to pass the fixtures in question, yet, finding the intention to be that they should not pass, the Court declared them to be the property of the assignees. So, here there is no intention manifested to pass the property in the fixtures. In *Ex parte Quincey*(b), R. sold the utensils of a brewhouse and granted a lease to B., and then mortgaged the brewhouse "with the appurtenances, &c." to J. S. B. after this sold his lease and utensils to W., who afterwards mortgaged the whole to R., who became bankrupt. J. S. claimed the fixtures as passing by the mortgage to him. But it was held, that they belonged to the assignees, and the Lord Chancellor said, "I am inclined to think it was not the intention of R. to mortgage the utensils; for there is some description, generally, of things in a brewhouse. The manner of describing the parcels shows he did not at all mean to mortgage the utensils; for the word 'appurtenances,'

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(a) 3 Tyrw. 603; S. C. 2 Ciomp. & Mees. 153.

(b) 1 Atk. 477.

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seems to intend only things belonging to outhouses." [Sir *J. Cross*. Is it not a clear principle of law, that every thing will pass that a deed in law is capable of passing, unless there are words showing a contrary intention?] [*Erskine*, C. J. Especially where the characters of the owner of the inheritance, the mortgagor, and tenant in possession, are united in one and the same person.] If even that would extend to the fixtures on the premises at the time of the mortgage, it cannot be said to convey those placed thereon afterwards. But we think it in this case immaterial when these fixtures were affixed, because, 2dly, we contend they were in the possession of the mortgagor at the time of his bankruptcy, and therefore passed to the assignees. The majority of the fixtures in the present case are such as would usually be denominated tenant's fixtures, and if the mortgagee leaves these in the possession of the bankrupt mortgagor, they are liable to all the principles relating to reputed ownership. Here, although the *Duke of Richmond* was in possession, he possessed, as we contend, as agent and not as tenant: and it is well established that the possession of agent, if thereby a reputation of ownership is given to the principal, is sufficient to vest the property in the assignees. In *Arboin v. Williams*(a), had the property of the goods there in question ever been the property of the bankrupt, such parts of them as were in the hands of agents for the bankrupt would clearly have passed to the assignees. The whole question turns on the reputation of ownership acquired by possession. Real chattels in the possession of a bankrupt do not pass, because no reputation or presumption of ownership necessarily arises from such possession. But it is other-

(a) 1 Ry. & M. 72.

wise of personal chattels. The possession of things in the nature of realty raises no presumption in favour of ownership in the possessor, and therefore such possession does not bring them within the statute, as in *Coombs v. Beaumont* (a). There Mr. Justice *Littledale* says, "The steam engine is part of the freehold, and does not come under the description of goods and chattels. Independently of that, property affixed to the freehold is not within the intent of the statute, because the possession of such property does not create a visible ownership in the bankrupt so as to procure him credit." But if the property, though fixed, be such that not only a reputation of ownership but also a degree of credit from possession is likely to attach, then the above exception will cease. Of such latter character are the chattels in question. In *Rufford v. Bishop* (b), if it had not been established in evidence that the machinery was, according to the custom of the country, let to the manufacturing tenant, and should continue the property of the lessor, the Master of the Rolls would have awarded it to the assignees as passing to them under the reputed ownership clause. The same principle was maintained in *Watson v. Peache* (c), as applicable to property of another nature. In *Place v. Fagg* (d), Mr. Justice *Bayley* says, "Fixtures which the tenant has a right to remove, may be treated as chattels in a proceeding against the tenant; but as against the owner of the estate they are part of the freehold." We do not coincide in the latter part of this proposition, because we maintain that a sufficient distinction has not been drawn between those fixtures which may be termed landlord's fixtures, and those which

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(a) 5 B. & Adol. 72.

(b) 5 Russ. 354, *et seq.*

(c) 1 Bing. N.S. 327.

(d) 4 Mau. & Ryl. 281.

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may be denominated tenant's fixtures. *Hubbard v. Bagshawe*(a) is liable to the same observations as attach on the case of *Coombs v. Beaumont*, already cited(b). But the dicta of Lord *Lyndhurst* in the case of *Trappes v. Harter*(c), at pp. 264, 265 and 268, show his opinion at least to be, that had it not been the intention of the parties in that case, that the fixtures, which were the subject of the action, should not pass to the mortgagees, they would have fallen within the doctrine of reputed ownership. For he says, "it also appears that machinery of this description is in that part of the country constantly bought and sold, without reference to the freehold as between landlord and tenant; it is clear that such machinery put up by the tenant might be removed by him. The bankrupts were the reputed owners of the machinery, and in consequence of their being so considered, obtained extensive credit. We are of opinion, therefore, that with respect to machinery of this description, erected by the bankrupts for the purposes of trade, it would have passed to the executor and not to the heir." And again he says, after reviewing all the decisions on the subject, "Now these authorities lead us to the conclusion, that where utensils and machinery are erected by the owner for the purposes of trade only, in a neighbourhood where such utensils and machinery as these would commonly have been removed, and where this can be done without injury to the inheritance, they form an exception to the general rule, and are not to be taken as part of the inheritance, but as personal estate." Although the cases of *Coombs v. Beaumont*(d).

(a) 4 Sim. 326.

(b) *Ante*, 709.

(c) 3 Tyrw. 603; S. C. 2 Crompt. & Mees. 153.

(d) *Ante*, 709.

and *Boydell v. M'Michel* (a) may be cited against us in some respects, yet, we contend, that the doctrines there laid down in broad terms, being founded on principles erroneously said to be contained in *Horn v. Baker* (b), are to a certain extent objectionable. It is supposed that this latter case relates to all fixtures; but on examining that case, it will be found that the question of tenant's fixtures was not discussed. To say that no fixtures were goods and chattels within the statute, as in *Boydell v. M'Michel*, is going too far. All that can be maintained is, that no fixtures, which are properly regarded as *landlord's fixtures*, are within the statute. This seems to be the view taken of the subject by his Honor Sir G. Rose: for in *Ex parte Austin* (c) that learned judge says, "I have no hesitation in saying, that where fixtures are capable of removal, as between landlord and tenant, without injury to the freehold, they are within the order and disposition of the bankrupt." And that opinion is adhered to in *Ex parte Wilson* (d). Upon the whole, therefore, we contend, that to lay down such a rule as that no fixtures fall within the statute is too general,—that fixtures such as are usually denominated tenant's fixtures (and those now in question fall under that denomination) pass to the assignees when the bankrupt has them in his possession at the time of his bankruptcy. We say the true criterion is, whether or not the bankrupt is likely to acquire credit from such possession; and that this question being tried by such a test, must entitle the assignees to a judgment in their favour. With regard to those things which were affixed to the

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and others,

(a) 3 Tyrw. 974; S. C. 1 Crompt. Mees. & Roscoe, 177.

(b) 9 East, 215.

(c) 1 Deac. & Chit. 208.

(d) 4 Dea. & Chit, 155; S. C. 2 M. & A. 61.

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freehold since the date of the mortgage deed, those, we maintain, cannot pass by the deed in any event, as they could not have been within the contemplation of the parties when the security was effected. [*Erskine*, C. J. Have you any authority to produce, which goes so far as to decide that where the mortgagor alters the state of the property pledged, the security of the mortgagee does not attach?] (Upon this point, the cases of *Beck v. Rebow* (a) and *Longstaff v. Meagoe* (b) were referred to.)

The counsel for the respondent, Mr. *Richards* and Mr. *Reynolds*, were stopped by the Court.

ERSKINE, C. J.—This is a petition by the assignees, praying that they may be declared entitled to certain fixtures, which were in the bankrupt's possession at the time of the bankruptcy, and that, they having been sold, the proceeds may be paid over to them for the benefit of the general body of creditors. As assignees they are entitled to all the property of the bankrupt, whether real or personal, and to all goods or chattels whereof he was reputed owner, by having them in his possession, order, or disposition, by the consent and permission of the true owner thereof (c). The assignees rest their claim in this case on two grounds. It is said, that the bankrupt was in fact not merely the possessor, but was also the true owner. That though they admit the mortgage, yet the fixtures were not, and were not intended to be included therein. Some of the articles in question were, it is said, fixed before the mortgage was granted, and some after, to which latter the mortgagees are not entitled: and it is further contended, that the property was not in its nature

(a) 1 P. W. 94. (b) 4 Nev. & Man. 213. (c) 6 Geo. 4. c. 16. s. 72.

within the denomination of fixtures, but consisted of nothing more than ordinary furniture. If in point of fact such latter proposition were established, there would be an end of the question, and the assignees would be clearly entitled, as there is nothing in the mortgage that could by possibility extend to mere articles of furniture; and if there were, the operation of the 72nd section would predominate. But certainly, from the affidavits, the articles in question appear to be fixtures. They are, for the most part, not only modelled and fitted into their respective places and recesses, but are also fixed there by nails and plugs. So that though they might have been mere articles of furniture in the first instance, they have lost that character and have become fixtures. A distinction has then been contended for between landlord's fixtures and tenant's fixtures: in other words, those put up by the landlord and those put up by the tenant. And there are some fixtures of each description, which the law says the tenant cannot remove. The general rule once was, that a tenant could remove nothing that was affixed by him, if its removal would cause any detriment to the freehold. In favour of others, as well as of trade fixtures, great relaxation of the law has for some time been admitted. And I am inclined to think, that if the fixtures in this case had been put up by a party other than the owner of the inheritance, as by a tenant, he might have removed them, and so they would pass to his assignees in bankruptcy. But that is not the present case. Again, it is said that the property in question did not pass by the mortgage deed. Now it always appeared to me, that where the owner of the inheritance affixes property to it, it becomes a fixture in the general sense of the term and part of the freehold;

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and if the inheritance be afterwards sold or let, it goes with the freehold; and I confess I see no distinction for this purpose, whether the deed be one of absolute conveyance, lease or mortgage. A mortgage, therefore, made by the owner of the inheritance will, without naming them, pass all the fixtures therein. The case of *Ex parte Quincey*(a) was cited to show that such things would not pass without the deed evidenced an intention that they should do so. In that case there were peculiar circumstances, and I do not think that the judge who decided it intended to lay down any such general proposition so as to upset the doctrine, that where the owner divests himself of the freehold, he divests himself of all that was then part and parcel of the freehold. Again, it is urged, that as to those articles which were attached after the execution of the mortgage deed, they could not pass to the mortgagee. But there has not been cited any authority, or even dictum, for such a proposition. I confess I know no case which goes so far as to determine or even to intimate an opinion, that where a mortgagor in possession alters the premises by addition or otherwise, the mortgagee shall not take the benefit of such alteration. I can find no distinction, therefore, substantially, between those which were affixed before, and those affixed after the date of the mortgage deed. In this point of view also I am of opinion that all the fixtures alike passed to the mortgagee. Then comes the question of how far the mortgagee's rights were affected by the bankrupt having those things in his reputed ownership. The affidavits for the respondent, I see, contend, that inasmuch as part of the property on which these fixtures were, was let to a tenant, and another part was occupied by the *Duke of*

(a) 1 Atk. 477.

Richmond, as a friend of the bankrupt, without payment of any rent, therefore the bankrupt could not be said to be in possession as reputed owner, not having actual possession. But I cannot agree in this proposition. It is not, I conceive, necessary that actual possession should exist in order to let in the doctrine of reputed ownership. The possession of the tenant and of the *Duke of Richmond* are to be regarded for this purpose as the actual possession of the bankrupt himself, as the apparent owner, and, but for the mortgage, as the real owner. The true question is, were or were not these articles goods and chattels? Several nicely drawn distinctions have been raised as to a tenant's and a mortgagee's right, which have created considerable difficulty in my mind on these kind of cases. The common law judges seem to be of opinion that no fixtures whatever, if they be actually affixed to the freehold at the time of the bankruptcy, fall within the denomination of goods and chattels, as in the cases of *Coombs v. Beaumont* and *Boydell v. M^cMichel* (a). In the last especially the question was as to the right of the assignee in bankruptcy to stoves and such like things affixed by the tenant; and Barons *Parke* and *Alderson* expressed a decided opinion that such things as these did not pass, on the broad ground that though affixed by the tenant and he had a right to remove them during the term, yet being at the bankruptcy affixed to the freehold, they were not goods and chattels, and did not therefore pass. In other cases, as in *Rufford v. Bishop* (b), a less extended principle was maintained. But it is unnecessary for the purposes of this case to examine the correctness of these varying opinions. Neither do I think that the

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(a) *Supra*.(b) *Supra*.

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opinion of his Honor, Sir *G. Rose*, in the case of *Ex parte Austin* (a) and *Ex parte Wilson* (b) at all affects the question now to be considered. His opinion was, that tenant's fixtures would pass to the assignees. In that I entirely coincide. But here the circumstance that the bankrupt mortgagor was the owner of the inheritance, makes all the difference. In *Hubbard v. Bagshaw* (c), the Vice-Chancellor expressly draws the distinction between those things affixed by the owner and those affixed by the tenant, and it is a maxim of law that things affixed by the owner are part of the freehold itself (d). If this be so (and I have no doubt on the subject) the moment the bankrupt in this case affixed the articles in question to the freehold, they became part of the corpus of the freehold itself, and passed to those who had a right by his assignment of it under the mortgage deed. In the case of *Ex parte Loyd, re Ogden* (e), this distinction was pointed out by myself in my judgment, to which I still adhere, and I feel myself still bound to differ with the learned barons in *Boydell v. M^cMichel*, in the extent to which they would carry it. No case, however, has gone so far as to maintain that goods affixed by the owner of the freehold are capable of retaining the character of chattels, unless they be actually severed by him. Besides, in numerous other cases, the contrary is fully borne out by those of *Stewart v. Lombe* (f) and *Fagg v. Place* (g). My opinion therefore is, that as these fixtures were put up by the owner, they are not goods and chattels within the meaning of

(a) *Supra.* (b) *Supra.* (c) *Supra.* (d) *Ames on Fixtures*, 9.

(e) 3 *Dea. & Ch.* 765. S. C. 1 M. & A. 494.

(f) 1 *Brod. & Bing.* 506. S. C. 4 *Moore*, 281.

(g) *Supra.*

the act, and do not pass to the assignees, but belong to the mortgagee by the effect of the mortgage deed.

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Sir J. Cross.—In the first place, it is contended by the assignees, that the property in question could not and was not intended to pass by the deed. But I think the contrary position is clear, namely, that a deed purporting to pass the realty, as this mortgage deed did, passed also all that was affixed to it. In all the cases that have arisen, wherein has existed any difficulty, the dispute has been between landlord and tenant; and a difficulty has been attempted to be cast into this by the improper use of the term “tenant’s fixtures.” Here there is no relation of landlord and tenant, and there can therefore be no tenant’s fixtures. They are all put up by the owner of the estate, and coming within the doctrine of law, that things affixed by the owner become part of the inheritance, they pass by the mortgage deed. The doctrine of *expressio unius est exclusio alterius*, cannot apply here: for, although some things are mentioned in this deed in the nature of fixtures, and many others which the assignees now claim are omitted to be noticed, yet none need have been mentioned, as the conveyance of the land itself would have passed all that is attached to it; and such mention as is made in this deed of things which are fixtures, is a mere usual form adopted by conveyancers, not as being necessary, but to prevent disputes that might otherwise arise between persons ignorant of the effect of a bare conveyance of the land. I therefore think the property in all the fixtures is unquestionably in the mortgagees. Upon the question of reputed ownership, I do not find that the evidence is conclusive of the fact; and therefore, on that ground

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alone, my opinion is unfavourable to the assignees. But even had that been established in evidence, it is clear to my mind that the 6 *Geo.* 4. c. 16. s. 72. does not apply to any thing attached by the owner of the premises. Upon both points I therefore agree with his Honor the Chief Judge. There may be some articles of minor value claimed by the respondents, which may turn out not to be fixtures; these must be either determined upon between the parties themselves, or else if it is worth their while they may take a reference upon the subject. The iron fences would not of themselves be fixtures if they are merely occasionally used in one particular place, and are removed at times for general farming purposes; but used, as they appear to be, as a permanent fence, like one of wood, for the protection of the shrubberies, they assume all the character of fixtures, and pass to the mortgagees.

Sir G. ROSE was absent.

The petition was therefore dismissed, but without costs.

Ex parte RICHARD F. CASS.—In the matter of JOSEPH RIVERS.

March 12.

If A. employs B. as solicitor in business, the bill for which is not taxable, and also requires B. to strike a docket, and B., because he is not admitted as a solicitor in bankruptcy,

employs C., a solicitor of the Court, for that purpose. B. cannot divide his bill so as to exclude from taxation the otherwise untaxable items by procuring C.'s bill of costs to be taxed separately; but B.'s own bill and C.'s must form one bill, so that all may be taxed.

Semble, That business preparatory to striking a docket is taxable in bankruptcy.

THE petition stated that the petitioner, as petitioning creditor, employed *Richard Jordan, Henry Wartnaby, and Christopher Edward Dampier*, of Ware, solicitors in partnership, to issue the fiat in October 1834, and to act thereunder as the petitioner's solicitors down to the choice of assignees, and on other matters and business

for the petitioner as his solicitors. That the bill of costs of the petitioner, as petitioning creditor, was made out by Mr. S. *Risley*, a solicitor of the Court of Review, and taxed by the Commissioner; and, when taxed, was paid to *Risley* by the official assignee; but the same was done without the knowledge of the petitioner, and without any communication with him upon the subject. That the bill was made out as due to *Risley*, but that he, in fact, only acted as the agent for *Jordan, Wartenaby, and Dampier*. That this latter firm had since delivered another bill of costs to the petitioner, alleged to be due from him to them, in which there were charges relative to the docket and bankruptcy, and which were not included in the bill of costs so taxed by the Commissioners as aforesaid. The last bill delivered to the petitioner had remained untaxed, and contained, as alleged by the petition, extravagant and unreasonable charges. The petition therefore prayed the usual order for the taxation of the latter bill also.

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Cass.

From the affidavits it further appeared, that none of the firm of *Jordan & Co.* had been admitted solicitors of the Court of Bankruptcy, and that they had therefore employed *Risley* to strike the docket. The bill of costs delivered by *Jordan & Co.* related entirely to matters of conveyancing (not taxable), excepting a few items incurred preparatory to the issuing of the fiat. The envelope containing that bill also contained the bill of *Risley*, with a note in the following words:—"Messrs. *Jordan & Co.* present their compliments to Mr. *Cass*, and inclose their bill and also Mr. *Risley's*, which has been forwarded to them for that purpose."

Mr. *Russell*, for the petitioner. The solicitors employed by the petitioner to strike the docket were *Jor-*

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dan & Co., and *Risley* was merely their agent; consequently as between *Jordan & Co.* and *Risley* and the petitioner, the latter was responsible solely to *Jordan & Co.* The bill for striking the docket should therefore have formed part of the bill subsequently delivered by *Jordan & Co.*, and they were not justified in splitting their bill into two parts, one including the taxable and the other the untaxable items. A solicitor having demands on items taxable, and items not taxable, is bound to insert the whole in one bill, which bill becomes taxable; and he cannot bring an action in the first instance and recover for the non-taxable business, so as to avoid having the latter portion taxed (a). Moreover this bill is taxable even standing by itself. *Ex parte Smith* (b), a bill containing items for a journey to procure the affidavit of debt, and for striking the docket, were held taxable, the former item being said by Lord *Eldon* to be business relating to bankruptcy.

Mr. *Bethell*, for the respondents. It is decided that business done in bankruptcy does not render the solicitor's bill for the same taxable under the stat. 3 *James* 1. c. 7. s. 1. (c). Such a bill was therefore only taxable under the summary jurisdiction of the Chancellor sitting in bankruptcy; and for business done prior to

(a) See 1 Chit. (T.) K. B. Prac. 46; *Thwaites v. Mackerson*, 3 C. & P. 341; 1 Moo. & M. 199, S. C.; *James v. Child*, 2 Crom. & J. 678; *Wardle v. Nicholson*, 4 B. & Ad. 469; 1 Nev. & Man. 355, per Lord *Tenterden*; *Smith v. Taylor*, 7 Bing. 259; 5 Moo. & P. 66; *Hill v. Humphreys*, 2 B. & P. 343; *Winter v. Payne*, 6 T. R. 645; *Peake*, 102.

(b) 5 Ves. 706.

(c) *Crowder v. Davis*, 3 G. & J. 433; *Hamilton v. Pitt*, 7 Bing. 232; 4 Moo. & P. 878; 1 Dowl. P. C. 210, S. C.; *Burton v. Chatterton*, 3 B. & Ald. 486. And see 1 Chit. (T.) K. B. Prac. 45:

striking the docket the Chancellor had no jurisdiction even to tax the bill, because it was not till the docket was struck that any jurisdiction was given. In *Ex parte Smith* (a) one item was clearly taxable, and that may have induced Lord *Eldon* to consider the prior items drawn with it into the doctrine of taxation. The point set up at this period by the petitioner would at most be fairly open to argument, had those portions of the entire bill, which were taxable, remained unliquidated; but the circumstance of their having been taxed as well as paid, puts at once an end to the question. The only remedy of a petitioning creditor in regard to the taxation of costs, is, in the instance and according to the mode pointed out by the 6 *Geo. 4. c. 16. s. 14.* and that does not extend to the subject-matter of this petition. The words of that section are, "that the petitioning creditor shall, at his own cost, sue forth and prosecute the commission until the choice of assignees; and the commissioners shall, at the meeting for such choice, ascertain those costs, and by writing under their hands direct the assignees, &c., to reimburse, &c., such costs, &c." By these words all other costs besides those with which the estate is to be burthened, are excluded from the provision for taxation. In *Ex parte Wilson* (b) also, it was held that the Court of Chancery sitting in bankruptcy had no jurisdiction in bankruptcy to order the petitioning creditor to pay the solicitor his bill of costs up to the choice of assignees; and by a parity of reasoning, the Court cannot order the taxation of such bill between the solicitor and the petitioning creditor.

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Mr. *Russell* was not called on to reply.

(a) 5 Ves. 706.

(b) Buck, 475.

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Cass.

ERAKINE C. J.—The only doubt which ever existed in my mind as to the decision we should give in this case, arose from not clearly seeing whether *Risley* was employed or adopted by the petitioner as his solicitor, or whether, on the other hand, *Jordan & Co.* were employed entirely and solely by the petitioner, and they employed *Risley* as their, and not the petitioner's agent. But, on looking into the affidavits, it is very manifest that he was simply the agent of *Jordan & Co.*, and that they procured him to do the business under the fiat, because they, not being admitted solicitors of the Court of Bankruptcy, were of themselves unable to act in the business ostensibly. In the bill which is the subject of this petition, namely, that for business done *de facto* by *Jordan & Co.* only, there are charges some for business relating to bankruptcy, some having no reference to it. I think it beyond doubt that those items which were for steps relative to the bankruptcy, though preliminary to the fiat, are strictly items for business done in bankruptcy; and it has been over and over again decided, that a solicitor having a demand for business, part of which is taxable and part not, cannot split and subdivide his bill so as to avoid taxation of the whole; and therefore that if there be one taxable item in a bill, the whole becomes subject to the client's right to have it taxed. In what Court then is the bill taxable? It certainly contains items only incurred for matters in bankruptcy, which are taxable; and this, therefore, is the proper tribunal before which the object of the petition can be attained. But an objection is raised because the 14th section of the Bankrupt Act points out one subject and mode of taxation. But that clause only refers to and ascertains the costs incurred by the petitioning

creditor for the benefit of the estate, and to which the estate is liable; and there is no inference to be drawn from it that I can discover preclusive of our entertaining and granting the present application.

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Sir J. Cross.—I entirely agree in that which has just fallen from his Honor the Chief Judge. There is nothing in the clause in question which can lead me to suppose that it was intended to provide for the settlement of the question of taxation between the solicitor and the petitioning creditor; but it is as between the petitioning creditor and the estate, to ascertain how much the estate shall reimburse to the petitioning creditor, that that part of the clause is introduced. Many items may be struck out of that bill to which the solicitor may be entitled as against the petitioning creditor, who employs him, though the petitioning creditor is not allowed to charge them against the estate; and in like manner those items may be the subject of taxation between the solicitor and the petitioning creditor. It would be monstrous to say, that all items which the Commissioners strike out of the petitioning creditor's bill as not chargeable against the estate, must be paid to the solicitor without any sort of check in the shape of taxation. I therefore agree that the prayer of this petition must be granted.

Sir G. Rose concurred.

The COURT made the usual order for taxation.



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April 22.

MEMORANDUM.

Mr. *Alexander* was this day called within the bar, and took his seat accordingly.

April 23.

Fiat will not be superseded on consent under the composition clauses (6 *Geo.* 4. c. 16. s. 133, 134,) until after the second meeting.

Ex parte BOARDMAN.—In the matter of BOARDMAN.

THIS was a petition to supersede a fiat by consent of all the creditors, who had proved, they accepting a composition under the 6 *Geo.* 4. c. 16. ss. 133, 134. Two meetings had been appointed by the Commissioner, according to the 1 & 2 *Will.* 4. c. 56. s. 20; one only of which had taken place, the assignees being then chosen, but the time for the second meeting had not yet arrived.

Mr. *Ayrton* for the petition.

The COURT, however, thought that the second meeting under the new Court Act must now be regarded as the third meeting under the law as it formerly stood: prior to which, according to the pre-existing practice, a commission could not be superseded by consent, since other creditors might come in at the last meeting whose assent might not be conceded; and therefore the application was refused.

Ex parte ELLISON.—In the matter of BLOXHAM.

1835.

IN this case a question arose whether the Court had jurisdiction to entertain a petition seeking the delivering up of a specific chattel.

April 24.
Quere, if the C. R. has jurisdiction to entertain a petition seeking delivery up of specific chattel. It has, if parties respondent consent to be bound. But respondent being trustee cannot consent.

The COURT said, that if the respondent would consent to be bound by the decision, they were perfectly competent to decide, and ready to hear the petition; but otherwise they could not do so; but suggested, that as the respondent was a trustee, it was not competent to him to give such consent.

Ex parte EMANUEL MENDEL, DANIEL HUGHES, and
 and JAMES HUGHES, creditors.—In the matter of
 THOMAS HUGHES.

THIS petition stated that the fiat issued the 25th April 1834, on the petition of *J. Lomax*, and that Messrs. *Lingard & Vaughan* were solicitors to the petitioning creditor. That about the 12th and 13th May 1834, the bankrupt assigned all his personal estate and effects to *Edward Hamer, William Dakin, James Lomas, Patrick Magee, and William Dean*, in trust for the equal benefit of his creditors. That under that assignment, the trustees collected his estate and carried on his business, and received and paid divers large sums of money, and bought and sold of and to themselves; and upon their transactions under the trust, they became, at the issuing of the fiat, greatly indebted to the estate of the bankrupt. That the bankrupt was at that time, and still adverse creditors to annul that fiat and issue an effective one, held, that without reference to their conduct, the trustees must be removed from the office of assignees in order to take the accounts against them as trustees.

April 22.
 Trustees under a deed of trust to manage property for benefit of creditors, to protect the trust, issue a fiat against the debtor, and thereby prevent creditors dissenting from the trust deed from issuing an adverse fiat. The trustees continue to manage the property under the trust deed, and do not further prosecute the fiat than by getting themselves appointed assignees. Upon petition of the

The Court will order a reference to inquire if it is proper to carry on the bankrupt's business, although some of the creditors dissent, but they will have liberty to prosecute the order.

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and others.

continued indebted to the petitioners respectively, in debts amounting to about 1959*l*. That the trust deed was presented to *Emanuel Mendel* for his execution, and 10*s*. in the pound was offered to him, which he refused. That the trustees, shortly after executing the trust deed, paid to *Patrick Magee* 200*l*., on account of his debt. That *Lomax*, and Mr. *Seddon*, the solicitor for the trustees, shortly afterwards called upon *Mendel* and offered him 170*l*. in discharge of his debt, which *Mendel* refused to accept, and informed them that he would sue the bankrupt or issue a fiat against him; whereupon *Seddon* stated that he had struck a docket against the bankrupt, and should proceed to open it, unless all the creditors would come to an arrangement or composition. That the fiat so issued on the 25th April 1834, was annulled for want of prosecution, and another fiat was issued on the 29th May following, on the petition of *Dakin*, by *Seddon*, as his solicitor. That this fiat was also annulled for want of prosecution, and another issued on the petition of *Hamer*, by the same solicitor, on the 3rd July following, which was in like manner annulled, and another issued at the suit of *Warburton*, by Mr. *Coates*, as his solicitor; which was again annulled in like manner, and another issued on the petition of *Lomax*, by *Seddon*, as his solicitor; and which fiat was the one in prosecution at the time of presenting the present petition. That the petitioners were desirous to issue a fiat, but could not by reason of the existence from time to time of those before mentioned. That the petitioners believed such fiats had been issued to compel the creditors to accept a composition, and not for the legitimate purpose of working any one of them for the benefit of the creditors. That at a

meeting in October for that purpose, *Hamer, Dakin, Lomax*, and *Magee*, were chosen assignees, the petitioners *Mendel* and *Daniel Hughes* dissenting. That at that meeting a question was put by the Commissioners to the assignees, as to where they would wish the money arising from the bankrupt's estate to be deposited; upon which the solicitor, Mr. *Seddon*, fixed upon the Northern and Central Bank of England for that purpose, the said assignees then stating that they were not interested in such bank. That the petitioners had since discovered that *Lomax* was one of the proprietors of the said bank. That the said assignees, being also the trustees, settled their accounts as trustees with themselves as assignees, and as such assignees released themselves as trustees; and that thereby a great loss accrued to the bankrupt's estate. That the object of the assignees in getting themselves appointed was to carry on the bankrupt's business for their own benefit, and to release themselves as trustees; and that they had accordingly so carried on the business and applied large portions of the bankrupt's estate for that purpose, instead of making a dividend among the creditors. That the assignees had laid out, and were still about to do so, large sums, part of the said estate, upon the mill and works of the bankrupt, which was wholly unwarranted. That they had obtained the assent of some of the creditors to certain resolutions to enable them to do so, but that such assent was given by the creditors in ignorance of the assignees' conduct, and that the assignees had carried on a system of buying and selling to and from the estate, in direct breach of their duty as assignees, for their own benefit; the petitioners therefore prayed that

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Hamer, Dakin, Lomax, and Magee might be removed and other assignees chosen; and that they might be restrained from voting in the new choice, and for an account of all their receipts in respect of the said estate, from the date of the trust deed or prior thereto, and for a general account and repayment to the new assignees of the £200l. paid to *Magee*, and to charge the assignees with all losses occasioned by their mode of dealing with the bankrupt's estate. It will be observed that *Dean*, one of the trustees, was not appointed one of the assignees. Several affidavits were filed on behalf of the respondents, tending to show that they had only been actuated by fair and proper motives for the benefit of the general creditors, in the line of conduct adopted by them.

Mr. *Swanston* and Mr. *Bethell*, for the petition, stated the foregoing circumstances from the petition, and were then stopped by the Court.

Sir G. ROSE.—The main facts of this petition being taken to be true, namely, that the assignees were the parties who acted as trustees and liable to be called on to account, it is quite clear what must be our result of this petition. The Court in directing an account must remove the present assignees. We cannot, for one instant, sanction the trustees acting as assignees. We must take the management out of their hands. They are here the same parties who are subject to account, and whose duty it is to enforce that account. And it is an universal rule, that such conflict of duty cannot be allowed. Without the least regard to the conduct of

these parties, whether proper or improper, this is the only course.

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Ex parte
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and others.

Mr. *Anderdon* and Mr. *Bacon* for the respondents, the assignees. As far as concerns the rendering of accounts, we are perfectly ready to accede to that part of the prayer. But we object to the removal of the assignees, because we maintain that there is no ground for it. As regards our mode of dealing with the estate, that was sanctioned by the entire body of the creditors of the bankrupt, excepting only the present petitioners. This case is precisely that of *Ex parte Steele, re Eddleston (a)*, and in that case the assignees were not removed by the Court. Here have been the purest motives to act for the benefit of the estate, evidenced indeed by the state of the property. At the time these assignees entered into their office of trustees under the trust estate, the bankrupt's assets amounted to no more than 29*l*. There was a large debt, besides others, due to the excise, and nothing existed to pay even that, which having priority would have swept away every thing, if the estate had then been brought to the hammer under the fiat. That debt has been paid off by the exertions of the assignees, and it cannot be denied that they have, by their mode of dealing, produced a profit to the estate. But even if a loss had accrued, they could not be responsible beyond the amount of the assets of the bankrupt at the time they originally took the affairs in hand. We say, that there is no ground whatever for

(a) C. R. May 1834. In this case I was counsel, and it certainly occurred to me that, from the mode in which the assignees had dealt with the property, there were ample grounds for their removal, but the point was given up, and a reference to take the account was agreed upon without argument as to the removal of the assignees.—E. C.

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 and others.

this petition being filed. Had the demands of the petitioners been confined, as they ought to have been, to the inspection of our accounts, they might have been, and were open to them at all times. This, therefore, has not even the refusal to render accounts to warrant it.

Sir G. ROSZ.—The degree of culpability on the part of the assignees, as to their mode of dealing with this property, must not be supposed to weigh at all in this matter. That is a subject to be considered with reference to the quantum with which these parties are to be charged; and a reference as to the degree of acquiescence by the creditors in their line of conduct, and as to how far they were justified in pursuing it, will easily ascertain it. But I repeat, that the taking of the accounts being one necessary step in justice to this petition, it is impossible that the Court can allow the assignees to remain in a situation where they may be swerved from their duties as regards the interest of the bankrupt's estate. They stand here as trustees opposed to themselves as assignees. In the case of *Ex parte Steele, re Eddleston* (a) there was no trusteeship in question, and the question was simply, whether the assignees had rendered themselves personally responsible from their mode of dealing with the property. It would be no answer in the mouths of the trustees, if a suit were commenced against them relative to their dealings in relation to the trust, to state, that the trust deed was rendered null and void by the fiat. They must account, even if an offer were made (these circumstances being known to us) to pay all the opposing creditors in full (b), we could not

(a) *Supra*.

(b) This offer was in fact made.

sanction it, we must look to the benefit of creditors in general upon principles of public policy.

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Mr. *Swanston*, in reply, was stopped.

ERSKINE, C. J.—It has all along appeared to me that we are bound to direct an account to be taken in this case, and that the persons who are now assignees, and were formerly trustees, must account as assignees and also as trustees. Because this fiat, though issued long after the execution of the trust deed under which these assignees acted as trustees, must over-ride all the transactions under the deed; inasmuch as the act of bankruptcy on which the original fiat issued was anterior thereto; and from the first moment therefore of the interference of these parties in the property, they were liable to account in bankruptcy for their dealings with it. I have felt great anxiety in this case not to remove the assignees, if I could see my way to retain them with justice; because although they have been guilty of improper conduct, as respects the number of fiats they have caused to issue without having any real and *bonâ fide* intention to prosecute them until they were forced thereto by these petitioners; yet as it at present seems to me that their only object was to work the property for the general benefit of the creditors, and not for their own individual benefit, which they did not appear at all to have in view, to the exclusion of other creditors, I certainly have felt a great disinclination, by their immediate removal, to prevent the working out the remedy which it was their object to attain. They have now, it appears, rendered themselves personally responsible to a considerable extent, from the risk of which they

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might fairly save themselves by continuing to trade with the property as they have hitherto done. Nevertheless, I cannot see how such removal can be avoided. It would have been extremely difficult to do so, even if *Dean* had been one of the assignees as well as trustee. But as he does not appear to be vested with such double capacity, it is impossible to avoid directing a new choice. I regret we are forced to come to this decision, as it may be fraught with some personal hardship to the assignees. But if such hardship should fall upon them, they have brought it upon themselves from the very beginning, having carried on this business under the deed instead of working out the fiats in due course of law, as they ought to have done. The only way in which this Court can do justice to creditors who are absent, is by the removal of the present assignees; and it will be for the assignees, to be newly chosen, to carry into execution the order of the Court properly.

Sir J. Cross.—The original act of bankruptcy on which this fiat is based, was committed in or anterior to the early part of April 1834, and one of the present assignees, *Lomax*, struck the docket, which was the foundation of the fiat that at that time was issued, with his eyes open; and known, as these and foregoing circumstances must have been, to all the present assignees, that fiat is treated as a nullity, and a deed of trust is executed and acted on in preference. To what extent that was then acted upon does not appear, or whether *Dean*, the fifth trustee, ever interfered. But it is quite clear that four of the trustees, who are now the assignees, when appointed as assignees, acknowledged their acts done in the capacity of trustees, and now re-

main responsible for those acts. It does not seem to me that *Dean* is a necessary party to this proceeding, unless it turns out that the four trustees, who are the assignees before the Court, are not capable of answering any deficiency to the estate, in which case *Dean* must be resorted to. It is not disputed that the assignees had some authority for carrying on the trade. But what the Court is bound to object to is, that they do those things as trustees which are unwarrantable in them in their character of assignees; and therefore they must be removed. There is certainly an objection and difficulty to the removal, arising from the danger of stopping the trade, the carrying on of which was sanctioned by the majority of the creditors; but if they be not removed till a fair time has elapsed for the appointment of others in their stead, that objection is obviated. I therefore entirely concur with the Chief Judge, that the removal of the present assignees is inevitable.

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Sir G. ROSE.—The offer now made by the respondents is fair and just on their parts (*a*). But the Court can be no party to any such arrangement; but, on the contrary, is bound to defeat it. If this arrangement had extended to affect the property of the petitioners only, then the Court might have been bound to acquiesce; but where it is incident to the administration of assets,

(*a*) The respondents' proposed minutes were as follows:—To pay all the debts of the petitioners, and the other creditors, in full; or an inquiry what creditors acquiesced in the mode of management; what loss accrued therefrom to the estate; declare respondents liable to make good the loss to all except those creditors who so acquiesced. The master to examine, &c. The petitioners to conduct the inquiry and taking of the accounts. Assignees to be restrained from interfering. Reserving further directions and costs.

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MENDON,
and others.

the Court is bound, as it always does, to discourage it. Take the case of an attempted arrangement to supersede a commission, or to promote the bankrupt's obtaining his certificate prematurely, or to affect the general rights touching the distribution of unclaimed dividends of the general body of creditors, if even one absent creditor is likely to be prejudiced, the Court *ipso motu* is bound to set its face against it. The present is in fact tantamount in this respect to a petition on behalf of all the creditors, and the Court must look to the general interests, and not suffer inquiries to be smothered by any arrangement with two or three such creditors. The order must therefore be, that a new choice shall take place, with the usual directions restraining the respondents from voting or interfering in the choice; that the bankrupt's estate, in taking the accounts, ought not to be charged with the costs of any fiat, other than that now in prosecution. Inquire whether the carrying on of the business has been, and is, for the benefit of the bankrupt's estate, or has been so carried on with the consent or subsequent approbation of the creditors, any or either, or which of them, and whether it will be for the benefit of the estate to carry on the same. Separate report on this last item of inquiry, and, till report, let respondents be at liberty to continue possession and to carry on the business. Inquiry whether the sums laid out or agreed to be laid out, or the expense incurred upon the mill and works and on the water-mill, has been properly and beneficially incurred with the consent, &c., of creditors, any and which. A like inquiry as to the buying and selling. Liberty to state special circumstances. Reserve further directions and costs.

What the parties may do with this order by arrangement out of Court, when they have it, this Court has nothing to do with.

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Mr. Swanston. The Court has no jurisdiction to direct an inquiry, if it was beneficial to the estate of the bankrupt to carry on the trade. The object of the bankrupt laws is immediate distribution of the bankrupt's property, and whatever the amount may be, however small, the Court must see it distributed, and cannot countenance any delay unless assented to by every one of the creditors. We throughout have objected to any such arrangement.

Per Curiam.—The resolution of so large a majority of creditors seems to have been fair and provident.

Mr. Swanston. But the creditors who were not present, can in nowise be bound by them.

Per Curiam.—Then any creditor who is, or may become a creditor under the fiat, may apply to the Court for leave to prosecute this order. There can be no objection to the mere inquiry.

The Order was as suggested by Sir *G. Rose*.



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April 22.
June 2.

On an agreement for a composition, *A.* the creditor received as a further security, the assignment of several debts due to *B.* the debtor. Default was made in payment of the instalments of the composition, and *B.* became bankrupt. Held, that *A.* might prove the amount of his original debt, but that he could not also retain the benefit of the assignment of the debts. The value of them was therefore directed to be ascertained, and liberty given for *A.* to prove for the difference, if he elected to retain them.

Ex parte the Right Honorable HENRY ELLIS and others, Assignees of Sir G. DUCKETT & Co.—In the matter of PHILIP MATTHEWS CHITTY (*a*).

THE petition in this case stated that a fiat issued against Sir *George Duckett & Co.* on the 22d of March 1832, and the petitioners were duly chosen and appointed assignees. That *Philip Matthews Chitty* of Shaftesbury, sometime in or about the year 1820, opened a banking account with Sir *George Duckett & Co.*, and continued the same from thence up to the time of their bankruptcy, when he was indebted to them in the sum of 22,839*l.* 19*s.* 8*d.* upon the balance of accounts for monies lent and advanced, and paid by them to the order of *Chitty*. That the said *Philip Matthews Chitty*, in order to secure to the said Sir *George Duckett & Co.* the repayment of the advances made by them to and on his account, did from time to time during the before mentioned period, deposit and lodge in their hands various deeds, assignments, bonds, warrants of attorney, policies of insurance, bills, promissory notes, and other securities, and undertook and agreed to assign the same to Sir *George Duckett & Co.* upon their request; and, amongst others, the several securities mentioned and set forth in the schedule to the petition. That by a deed of assignment bearing date the 1st day of June 1832, made between *Chitty* of the one part, and the petitioners (assignees as aforesaid) of the other part, after reciting that various persons were indebted to *Chitty* in specific large sums of money, *Chitty*, in consideration of the said debt so due from him to Sir

(*a*) The arguments *ex relatione*.

George Duckett & Co. did bargain, sell, assign, transfer, and set over unto the petitioners (assignees as aforesaid) the several debts or sums of money therein mentioned, subject to several prior assignments and incumbrances therein recited, as affecting the same to a large amount; to receive and take the same unto the petitioners, subject to a proviso for redemption thereof upon payment to the petitioners of 7500*l.* with lawful interest thereon, at the times therein mentioned and long since elapsed. That default was made in payment of the said sum of 7500*l.*, and the petitioners were informed and believed that the debts so assigned by *Chitty* were disputed to be due and owing to him, and were subject to prior charges and incumbrances made thereon by *Chitty* to the full extent of the debts due or alleged to be due to him from the persons therein mentioned; and that such debts being chiefly due for bills of costs alleged to be owing by them to the said *Chitty*, were liable to taxation, and therefore of uncertain amount; and that it would therefore be more beneficial to the estate of Sir *George Duckett & Co.* to collect and get in the several sums due upon the other securities so deposited by *Chitty* with Sir *George Duckett & Co.*, and to apply the same, so far as it would extend, in payment of their said debt. That after giving credit for all sums of money received by the petitioners on account of the said debt, there remained due to the petitioners (assignees as aforesaid) from *Chitty* the sum of 21,954*l.* 12*s.* 2*d.* with interest thereon. That a fiat issued against *Chitty* on the 10th day of November 1832, under which he was duly found and declared a bankrupt, and *John Ravenhill* and *Nathaniel Fletcher* were duly chosen his assignees: and at a meeting held under the said fiat on or about the 26th day of

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January last, the petitioners caused a claim to be entered upon the proceedings under the said fiat for the amount of the said debt of 21,954*l.* 12*s.* 2*d.* so due to the estate of Sir George Duckett & Co. That the petitioners were advised and believed that the securities so deposited by *Chitty* were of uncertain value, and that the same could not be reasonably expected to produce more than 5000*l.*; and that the estate of *Chitty* was involved in several expensive suits at law and in equity; and that no dividend had yet been paid under the same, and the petitioners were unable to ascertain how much the same would pay; but had been informed and believed that the assets then possessed and received by his assignees, as arising therefrom, amounted only to 1250*l.*; and that the debts already proved against the same amounted to 65,000*l.* and upwards. The petitioners therefore prayed that they might be allowed to value the said securities at the sum of 5000*l.*, and that they might be at liberty to prove the balance of their said debt against the estate of *Chitty*, and that the Court would direct that *Chitty* and his said assignees should join with the petitioners in all necessary and legal measures for the recovering and enforcing payment of the several and respective sums of money remaining due and owing upon the said several securities; and that in case the sums to be recovered thereon should exceed the said sum of 5000*l.*, that the petitioners might be at liberty to deduct the excess from their proof upon the estate of *Chitty*, or add the deficiency of the said sum of 5000*l.* to such proof in case the said securities should not produce such estimated value.

The bankrupt *Chitty* also filed an affidavit, by which it was sworn that there was an express agree-

ment between him and the petitioners, that on payment of 7500*L*., at the periods mentioned in the petition, they would release and discharge him from the payment of the 22,839*L*., and would also deliver to him the several securities pledged on account for them, as part of the composition; and that there was an express understanding that no greater sum should be required of him than the 7500*L*., provided that sum was punctually paid by the instalments agreed upon.

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Mr. *Montagu* in support of the petition. It is very clear that the composition deed does not in this case release the original debt, except upon the due and punctual performance of conditions precedent. Those conditions were, that the bankrupt *Chitty* would pay the instalments of the composition punctually at the stated periods. This he has omitted to do, and the petitioners have therefore a right to consider themselves remitted to their original debt and their remedies for the entirety of it. Upon electing to pursue this course, it is contended on the other side, that the petitioners have not also a right to retain those securities which they obtained by virtue of the terms of the composition. On the behalf of the petitioners I contend that we are entitled to retain the securities, and to have them sold and applied in part reduction of our original debt, with liberty to prove the residue against the estate of *Chitty*. It is very well established at law, that a debtor cannot demand a re-delivery to him of any security deposited by him with a creditor, unless he can make out that he has discharged the obligation he entered into at the period of the deposit. In this case, the deeds were deposited to secure the performance of the condition, to pay the

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7500*l.* by certain regular instalments. That condition is however broken, and the petitioners title to retain the securities is complete at law. How then, let it be asked, can a Court of Equity deprive them of that right? Upon what principle could any relief be extended to the debtor? There are many cases in which equity will relieve from the effect of non-payment of money, for instance, at a stated time, where it can do so without injury to either party; but in no case has it so relieved where it is payment under a composition. Equity as well as law has invariably held, that the terms upon which an agreement to receive a composition has been entered into, must be strictly observed by the debtor. Equity would not, therefore, relieve the debtor. How then does bankruptcy vary the rights of the petitioners? In *Ex parte Vere* (a) creditors agreed to take 10*s.* in the pound by instalments, to be secured by the debtor's promissory notes, with a proviso to release upon payment; and it was also provided, that on default of due payment, or in the event of the debtor's bankruptcy, the composition should be void. The first instalment only was paid, the second not; and then a commission issued. It was there held, that the creditors had a right to prove for the whole of the original debt, deducting only the first instalment paid. Then, if the proposition of the respondents in this case is to be supported, the first instalment ought to have been delivered up; for where is the difference, whether money is paid or money's worth is deposited, as in this case? But the Lord Chancellor determined adversely to such a proposition, and established the creditors' right to retain that which they had already acquired. A stronger case however than that, is that of *Ex parte*

(a) 1 Rose, 281.

Reay (a) in this Court. There, a creditor having agreed to accept a composition for his debt, took bills for the amount of the composition, and also had a bond assigned to him as part security for the composition. The terms of the composition deed, and also the circumstances of non-payment and subsequent bankruptcy, were like those of *Ex parte Vere*; and it was held, that the creditor might prove the balance of the original debt, and also retain the bond, so as to work out his entire indemnity.

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 and others.

Mr. *Swanston*, for the assignees of *Chitty*. Unless the entire contract of composition is to be abided by, the whole must fall to the ground, and all securities acquired under it ought to be delivered up. Although some distinction might be drawn between the case of repayment of money and redelivery of securities, I know I may venture to say that the case of *Ex parte Vere* (b) did not meet with the approbation of the profession, as a case to be adopted as a general precedent. The decision was arrived at through very subtle reasoning, upon circumstances which do not exist in the present case. And as to *Ex parte Reay*, the case was not such as to require the Court to declare whether the creditor had a right to retain the security; it was a mere question of the right to prove, and the Court thought the right of retention of the security involved in an ulterior question.

Mr. *Montagu* was heard in reply.

(a) 2 Mont. & Ayr. 33; S. C. more fully reported in 4 Dea. & Ch. 525.

(b) 1 Rose, 281.

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Sir J. Cross.—This is a question of very considerable importance, and I should prefer taking time to consider it in all its bearings before I venture to express a decided judgment. In the meantime, I must confess that I am at a loss to find any difference between the right of retaining money, or a bond and a collateral security for money. Here the petitioner allowed his debtor an extension of time for payment of his debt, on condition of the debtor's doing certain acts—a condition imposed in strict accordance with the rights of the creditor. This condition has been altogether broken by the debtor, and what equity is there for him or his representatives to come here and demand the redelivery of a security placed in the hands of the creditor, to secure the due performance of that condition? My present opinion is, that the respondents have no such right. But I wish, before I give my final judgment, to consider the point more maturely.

Sir G. Rose expressed his opinion as being against the petitioners' claim, and thought that neither of the cases cited applied strictly to the point before the Court. As regarded that of *Ex parte Roay*, he concurred in what fell from Mr. Swanston. In that case it was expressly intimated by the Court, that the right of retaining the security was not determined by them, but it left it open for the assignees to bring an action to determine that point. But in the present case the Court was called upon to declare the petitioners entitled to retain the security, by asking of the Court to direct a sale, and that the assignees should join in a conveyance. This, he thought, the Court could not do, inasmuch as his opinion was adverse to the petitioners' right to retain

it; and at the same time to prove to the full amount of the original debt, minus the instalment paid.

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ERSKINE, C. J., concurred in Sir G. Rose's opinion. But the case was ordered to stand over for judgment.

The Court now proceeded to deliver their judgment. *June 2.*

Sir G. ROSE.—I still remain of the same opinion which I expressed when this case was argued, and I do not think it necessary to say more upon the subject.

Sir J. CROSS.—In this case, the bankrupt being indebted to the petitioners in a large sum, they verbally agreed to accept about one-third part of the debt in lieu of the whole, to be paid by two instalments, and then to give a release; and, for securing payment on the appointed days, the debtor agreed to assign certain debts owing to him, and he accordingly executed, not a composition deed, but a simple deed of assignment of these debts, empowering the petitioners to sue for the same; and it was to be void on payment of the instalments. But the deed makes no mention of composition, and purports, on the face of it, to be a security for two instalments in part payment, and not in full satisfaction of the debt. The instalments became due before the bankruptcy, but no part thereof has been paid, nor has any thing been recovered under the deed, which turns out to be an inadequate security for the instalments. The petitioners thereupon claim to be admitted creditors for their entire debt, after deducting the value of the security. On the other hand, it is contended, that they must surrender the security if they claim the whole

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debt. In the first instance, the petitioners being already entitled to prompt payment or security to the full amount of their whole debt, voluntarily agreed to forego two thirds of it, and accept a security for the residue; they also agreed to give a certain time for its payment; but they obtained by the bargain no advantage whatever to which they were not before legally entitled. The debt was not thereby extinguished, nor was one debt substituted for another; the debt was still the same identical debt: whether it should be ultimately payable in full or in part only, that alternative was at the option of the debtor. But it is clear, that between the execution of the deed and the time appointed for payment, it was not in his option to rescind the deed; much less could it be so after he had made default and gained the advantage of time for the payment. That would be to make the deed void by non-payment, while the deed itself provides that it shall become void upon payment. It appears to me, therefore, that the deed, after the default of the debtor, and prior to his bankruptcy, was still in full force as a security for the subsisting debt, and that these creditors were then entitled to maintain an action at law for the whole debt; that a Court of Equity would not then have compelled either a stay of the action or a surrender of the security. If then, before the bankruptcy, these creditors were legally and equitably entitled to their whole debt, and to the benefit of the security they have, the same right still subsists; for it is a general rule, that bankruptcy does not in this respect alter the rights and duties of the debtor and creditor; and it is another general rule, that a creditor having a security on the property of the bankrupt, may avail himself of the security in reduction of his debt, and be admitted to

prove for the residue. The petitioners claim the benefit of this rule, and it seems to me they are entitled to it. The case that most nearly resembles the present is *Ex parte Vere* (a). There the debtor executed a general composition deed for the payment of a lesser sum by instalments; and his creditors covenanted, on payment thereof, to release their debtor. He paid the first instalment, but made default in payment of the second, and then became bankrupt; and the question was, whether the creditor should be admitted for the whole debt, deducting the instalment; and Lord *Eldon* there decided that he should retain it, and be admitted for the residue. The claim seems to be the same in the present case; for I see no difference in principle, whether it is a sum of money or a security that is given in part performance of a bargain for a composition; both being alike given in part satisfaction for the original debt, both may, I think, be retained to that end.

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ERSKINE, C. J.—In this case, the question was, whether the petitioners were entitled to avail themselves of the assignment of debts mentioned in the petition, in addition to the securities lodged with Sir *George Duckett & Co.* before their bankruptcy, and whether they might also prove the balance due on the original debt, after deducting the value of those debts and securities, there not having been any release by deed of the original debt, but merely a conditional engagement to release upon the payment of the composition at the times stipulated. I never entertained a doubt that, upon the failure of the condition, the petitioners were entitled to treat the agreement for a composition as a nullity,

(a) 1 Rose, 281.

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and to be admitted as creditors to the full amount of the original debt. If, however, they elect to set aside that agreement, they must, I think, give up whatever securities they hold by virtue of the agreement which they thus abandon. But the counsel for the petitioners contend that, according to decided cases, they have a right to repudiate the composition, and still retain those debts which have been assigned as security for such composition; a position which appears to me untenable, and not warranted by the cases relied upon. The first was *Ex parte Vere* (a), where the petitioners had executed a deed by which they consented to accept a composition of 10s. in the pound, payable by instalments; and at the time of bankruptcy the first instalment had been paid, but the notes given for the second instalments had been dishonoured, and the petitioners claimed to retain the instalments they had received, and to prove for the residue of their original debt; and Lord *Eldon* held them entitled so to do, upon the plainest and soundest principles, because it was by the deed under which they accepted the composition expressly stipulated, that in case of default in payment of any of the notes given for the composition, the creditors should be entitled to be paid the full amount of their original debts then due, after deducting such sums as they should have received; and therefore Lord *Eldon* said, "If this has been a payment according to the deed, they are entitled to retain it. If it has not been according to the deed, then it has been in part payment of these debts." In that case, therefore, whether the question were considered with reference to the deed, or with reference to a still subsisting contract, or even without reference to the deed,

(a) 1 Rose, 281.

looking to the simple fact of the creditor, without fraud, having received the money of his debtor before the bankruptcy, he was still entitled to retain it in the first alternative, by virtue of the express stipulation of the deed itself; in the second, by virtue of that general rule of law, which enables a creditor to apply, in part payment of his debt, any monies of his debtor that may come to his hands without fraud, and not specifically appropriated to other purposes, and especially by those provisions in the bankrupt laws which declare the balance of mutual demands to be the amount provable under the commission. The case of *Ex parte Wood* (a) recognized the latter principle; and held, that the payment was protected notwithstanding a previous secret act of bankruptcy. The case of *Ex parte Reay* (b) was one in which the Commissioners had refused to admit the proof of the debt, unless the creditors first gave up the bond of 3000*l.*, which had been assigned to them by the bankrupt at the time of their consenting to the composition; and the Court thought they ought not to make the delivery up of the bond a condition precedent to such proof. The bond in that case was not assigned as a security for the payment of the composition, neither did the creditors seek the assistance of the Court to enable them to enforce the bond against the obligor. The case was simply this, a creditor having in his possession property that had once been the bankrupt's, and which was claimed by the assignees, sought to prove his debt under the commission, and was rejected unless he gave up the property in dispute; which the Court thought was a question to be decided either in an action or on a petition to stay the dividend, but not on a petition for proof. But

(a) 4 Dea. & Ch. 508. (b) 2 Mont. & Ayr. 33; 4 Dea. & Ch. 525.

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the petitioners in this case are not simply seeking to be admitted as creditors upon an acknowledged debt, neither is the contest respecting their right to retain any sum of money in their hands as part payment of their debts; but on their right to retain securities. This gives rise to a very different question from any of those agitated in the cases relied upon. The right claimed by the petitioners must rest either upon their contract with the bankrupt or upon some general principle of law, independent of that contract. The contract is this; *Chitty* being indebted to the assignees of *Duchett* in 22,000*l.*, the assignees undertake, in consideration of an assignment to them by *Chitty* of certain debts owing to him as security for the sum of 7500*l.*, to accept that sum in full satisfaction of their whole demand, upon the express condition that the sum shall be paid by instalments at fixed periods. This contract was not reduced into writing, but its existence is admitted; and in part performance of this agreement, a deed was executed by *Chitty*, by which, after reciting that several persons named therein were indebted to a large amount, and that he had agreed to assign these debts, subject to certain prior charges thereon to the petitioners, for securing to them 7500*l.* by instalments therein specified, *Chitty*, by assignment, constitutes the petitioners his attorneys to recover those debts in his name, and apply them in payment of the 7500*l.* There is also a covenant by *Chitty* to pay the instalments, and a proviso that upon payment of the 7500*l.* the deed shall be void. It is to be observed, that there is no mention in this deed of the existence of any larger debt, nor are the terms of the agreement to assign those debts as a security. There is nothing, however, in the deed inconsistent with the

alleged contract; nor, taking the agreement and the deed together, is there any stipulation that in case of non-payment of the instalments the assignment of the debts should be void; nor, on the other hand, that if the condition should be broken and the assignees of *Duckett* should revert to their original debt, they should be at liberty to retain the securities given for the composition. The contract is altogether silent as to what shall be done with the debts assigned, if the instalments are not paid, and the petitioners should thereupon elect to proceed for the whole of their original debt. The first question, therefore, for the Court to decide is, whether any contract either to retain or relinquish the assignment can be implied from the circumstances; and, I confess, I find no grounds from which I can infer any contract either way. This event appears to have been unanticipated and unprovided for. This brings us then to the question whether there be any general principle of law, independent of any contract between the parties, by which the petitioners are justified in repudiating the contract for the composition, and yet retaining the securities given as a consideration for that composition. The cases cited afford no such principle; for the distinction between a creditor's right to retain money in his hands in part payment of his debt, and his right to retain as security for his debt, the deeds and property of his debtor in possession, is well defined and known. When, as I have stated, a creditor has money in his hands belonging to his debtor, if it has been obtained without fraud and not specifically appropriated to other purposes, the creditor may apply it in part discharge of his debt: but, to enable a creditor to retain deeds or property of his debtor as a security for his debt, he must have a lien

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thereon either at common law or by contract. There is nothing in the relation in which the parties stand to each other that gives a lien in this case, unless it arises upon the contract under which the assignment of the debts was made: but if the petitioners elect to repudiate that contract, and to revert to their original claim, then, as it appears to me, they must repudiate it *in toto* and abandon their claim to the debts assigned; to which they have no claim except by virtue of that contract. The petitioners therefore may either have the usual order for the valuation or sale of the securities deposited with Sir *George Duckett*, and for proof of the balance, delivering up the deed of assignment to be cancelled, or they may include the debts assigned in their valuation and prove for the balance of the 7500*l*.

The petitioners elected the alternative of giving up the security in question, valuing the other securities at 1000*l*., and proving in the usual manner for the balance of the original debt.

Ex parte JONES.—In the matter of BLEW.

6 May, 1835.

Usual order for sale of equitable mortgage made, notwithstanding argument that there being no deposit of deeds, the agreement was a mere executory agreement for a mortgage, and gave no lien on the property.

THIS was a petition for the usual order for sale in case of equitable mortgage.

Mr. *Teed*, in support of the petition.

Mr. *K. Parker*, for the respondents, contended, that as there was no deposit of deeds, the agreement on which the petitioners relied, would at most amount to

a mere executory agreement to grant a mortgage, and therefore created no lien on the property, and relied on the expressions in *Pain v. Smith* (a), *Ex parte Bruce* (b), and *Hockley v. Bantock* (c).

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The Court however made the usual order for sale.

(a) 2 Myl. & K. 418.

(b) 1 Rose, 374.

(c) 1 Russ. 141.

Ex parte WILLIAM MASTERMAN, WILLIAM PETERS, DANIEL MILDRED, JOHN MASTERMAN, JAMES MAUDE and HENRY OXLEY.—In the matter of WILLIAM PEATT LITT and JOHN JOSEPH HARRISON.

THE petitioners, being bankers, had dealings with the bankrupts, who were merchants. The bankrupts, in the course of such dealings, became indebted to the petitioners to the amount of 1500*l.*, for money lent on their joint promissory note, which, when at maturity, was renewed; and it was agreed that a further security should be given to the petitioners for its repayment, by means of the assignment and transfer to them of certain shares in the capital or joint stock of the Crown Life Assurance Company, then standing in the books of the company, partly in the name of *Litt* and partly in the name of *Harrison*. To effect this, on the 22d February

April 24.

The principle of Courts of Equity in regard to cases of specific performance of contracts concerning mere chattels is, that where Courts of Law, by awarding damages, can give adequate compensation, Courts of Equity will not interfere.

Therefore that principle cannot apply where the defaulting party has become insolvent: and the Court of Review acts on this principle.

Where the owner of shares in an insurance company transfers them by way of equitable mortgage, though he does not observe the rules of the company in regard to the mode of transfer, and though he continues to act as director without having any other shares than those assigned (the being a shareholder to a certain extent alone entitling him so to act), yet if the transferee gives notice to the company of his mortgage, and the owner becomes bankrupt, they are taken out of his order and disposition; especially where the company make entry of the notice in their books in such a manner as to evince their knowledge that such owner could not further dispose of the shares. Bare notice in such cases seems sufficient.

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1831, an indenture was executed between the bankrupts and the petitioners; by which, after reciting among other things that *Litt* was absolutely entitled to 100 such shares of 50*l.* each, and that *Harrison* was in like manner entitled to 80 similar shares, the bankrupts respectively assigned the 180 shares to the petitioners, subject to redemption on payment of the principal sum of 1500*l.* and interest; but with power to sell the shares in case the promissory note should remain unpaid two months after it fell due, with costs for further assurance. The petition went on to state that the above-mentioned indenture was prepared by and under the direction and advice of the then firm of *Haddan, Gatty and Haddan*; one of the *Haddans* (*Thomas*) being at that time solicitor to the Crown Life Assurance Company, and himself receiving instructions to prepare the indenture. On the occasion of preparing the indenture, and prior to the execution thereof, the petitioners were informed by the said *Thomas Haddan*, that upon the execution of the said indenture, and upon notice thereof being given to the said company, the petitioners would, under the terms of the company's deed of settlement, have a valid and effectual security upon the said shares for the repayment of the principal and interest due to them. And on the 23d February 1831, *Haddan, Gatty and Haddan*, as solicitors for the petitioners, gave notice to the company in writing of the transfer and assignment, by delivering to Mr. *Rainbow*, the actuary of the company, at the office, a notice as follows:—"You are hereby required to take notice, that by indenture bearing date on or about the 22d February 1831, made between *William Peatt Litt* and *John Joseph Harrison*, of Lime-street, in the city of London, merchants and

partners, of the one part, and *William Masterman & Co.* (the petitioners) of &c. of the other part, all those 100 shares of 50*l.* each of the capital of the company called the Crown Life Assurance Company, now standing in the names of the said *W. Peatt Litt* in the books of the said company, and all those 80 shares of 50*l.* each &c. in the name of the said *John Joseph Harrison* in the books of the said company, were, for the considerations therein expressed, assigned and made over by the said *W. P. Litt* and the said *J. J. Harrison* to the said *W. Masterman & Co.*, (the petitioners) their executors, administrators and assigns, upon certain trusts and purposes in the said indenture mentioned and contained.

(Signed) *Haddan, Gatty and Haddan.*"

Pursuant to this notice, an entry was made in the ledger, at the office of the company, wherein the shares were entered. The fiat issued against the bankrupts on the 21st June 1831, at which time they were indebted to the petitioners in considerably more than the 1500*l.* and interest. And in due time the petitioners applied to the directors of the Crown Assurance Company for the purpose of having the shares sold and transferred, according to the indenture of 22d February 1831; whereupon the petitioners were informed by the secretary of the company, that the said transfer and assignment had not been made in the manner and form prescribed by the directors; and although upon the receipt of the notice the said assignment and transfer would have appeared and been made known to any person applying or making inquiries at the office of the company concerning the said shares, or the owners thereof, yet that the said shares still remained in the names of the bankrupts respectively, and that a further transfer, according to the forms pro-

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vided by the said directors of the said company, was requisite, in order completely and effectually to transfer the said shares to the petitioners. The petition proceeded to pray the usual order for sale in cases of equitable mortgage.

From the affidavits in answer, on behalf of the respondents, the assignees, it appeared that the deed of settlement of the Crown Life Assurance Company contained, amongst others, the following provisions viz. :—

4. No person entitled to or claiming any benefit, or any share under any express or implied trust, or under any mortgage; charge, lien, or incumbrance, shall have any rights or remedies whatsoever (other than and except against and through and by means of his or her and their trustee or trustees, mortgagee or mortgagees); and the directors and trustees for the time being of this society, shall be at liberty, for all purposes whatsoever, to disregard such trust, mortgage, charge, lien or incumbrance, and shall not be bound or obliged, either at law or in equity, to observe or take notice thereof. And no person claiming the benefit of any such mortgage, charge, lien or incumbrance, shall be entitled to vote, or in any manner interfere in the concerns of the said society, or to take or receive the benefit of any such mortgage, charge, lien, or incumbrance, through the medium of the said society, or the directors or trustees for the time being thereof.

104. No proprietor shall be allowed to sell or dispose of any share or shares, without the consent of some three of the directors for the time being, present at a weekly board; and every person who shall be desirous of transferring all or any of the shares held by him or her in the society's capital stock, shall give three days

notice in writing at least, previous to and exclusive of a board-day, to the office of the society, of such his or her desire, and shall describe in such notice the share or number of shares, and the name and place of abode of the person or persons desirous of accepting the same transfer, and becoming a proprietor or proprietors of such share in the capital of the society.

105. No shares shall be transferred, except by deed or instrument in writing, in a form or forms to be prescribed by the directors for the time being; and every such deed or instrument to contain proper covenants and stipulations to be entered into with the trustees for the time being of the society, by which the vendee or transferee shall take upon himself and become subject to all contracts, duties and liabilities, which in respect of such transferred share or shares shall subsist or attach on the original or any subsequent proprietor thereof, or to which such original or subsequent proprietor thereof would in respect of such share or shares have been subject or liable, in case no transfer or successive transfers thereof had been made; and the vendee and transferee shall deposit a deed or instrument of transfer at the office of the society, to be there kept, and a certificate of the deposit of such deed or instrument of transfer shall, within fourteen days after such deposit, and on request for that purpose, be delivered to the vendee or transferee; and from the delivery of such deed at the society's office, and not before, the vendee or transferee shall become a member of this society, and a proprietor in respect of such share or shares so transferred to him, and every transfer shall necessarily, and by its own force, carry and include all profits and benefit on the share or shares transferred down to the time of the making the same,

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except such as shall have been actually declared to be payable to the proprietors ; and no sale or transfer shall be made of any fractional or aliquot part of any share of 50*l.*, so as to divide any share into parts : and no sale or transfer of any share shall be made while or so long as any sum or sums of money shall be due or unpaid to the society, for or on account of any call, fine, or otherwise, in respect of such share.

106. That in all cases where any shares in the said capital of 1,500,000*l.* shall be assigned or bequeathed to, or become vested in any person or persons in trust for any other person or persons, the receipt of the trustee or trustees, or his or their heirs, executors or administrators, shall, notwithstanding any equitable claim or demand whatsoever of the person or persons beneficially entitled to the said shares, be a good and sufficient discharge for the sum or sums of money which may become payable from the company, for or in respect of such shares, and shall discharge the company from all obligation of seeing to its application, or being answerable for its misapplication.

107. That in the event of the death of any proprietor, or of his or her being declared a bankrupt, or taking the benefit of any act passed or to be passed for the relief of insolvent debtors, his or her executors, administrators, legatees, or next of kin, or assignee or assignees respectively, shall not, as such, be entitled to hold his or her share or shares as a proprietor or proprietors of the company, or to vote or do any other act in respect thereof, unless and until he, she, or they shall elect to hold, and shall be allowed to hold such share or shares, as a proprietor or proprietors ; but such executors, administrators, legatees, or next of kin, and assignee or

assignees respectively, may, in the manner and upon the terms hereinafter mentioned, dispose of the shares so held by them; and that, on the application of the executors, administrators, legatees, or next of kin, or assignee or assignees of any deceased bankrupt or insolvent proprietor, to become a proprietor or proprietors, in respect of such share or shares as aforesaid, or for permission of the directors to sell and transfer the same, he, she or they, shall leave, or cause to be left, at the office of the society, for three days, the deeds or wills, and letters of probate thereof, or the letters of administration under which he, she or they, respectively, shall or may claim to be entitled to such share or shares, and shall pay to the secretary for the time, for registering every deed, will, letters of probate or administration, respectively, a reasonable charge for registering the same, to be fixed by the directors.

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108. That if any executor, administrator, legatee, or next of kin, as assignee or assignees, desire to hold such share or shares as aforesaid, and shall be approved by the board of direction, he, she or they, respectively, shall, within one calendar month after such approval shall have been duly certified, execute any deed or deeds in a form to be prescribed from time to time by the directors for the time of the said society, whereby he, she or they, shall become subject to the payments and liabilities, and to the observance of all such covenants, provisions, rules, and regulations, as the original proprietor of such shares would have been subject or liable to in case he, she or they had continued to hold the same; and immediately after the execution of such deed, and not before, he or she shall become a proprietor of the company in respect of such shares as aforesaid; and

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until such executor, administrator, legatee, or next of kin, assignee or assignees, shall have been approved as aforesaid, and have executed such deed or deeds as aforesaid, he, she or they, shall not receive or be entitled to any dividend, interest, benefit, profit or bonus, which may accrue, or be declared, or become payable on or by virtue or in respect of any such share, after the death, declaration, or bankruptcy, or adjudication of insolvency of any such member or proprietor; but the same dividend or interest, benefit or bonus, shall be retained by the society until some person shall have lawfully become a proprietor of such share, and a member of this society in respect thereof, or until the sale or disposition of such share or shares, and shall then belong to, and if payable, be paid to such executor, administrator, legatee or assignee, or his vendee or transferee, as soon as some person shall have lawfully become a proprietor of such share and a member of the society in respect thereof, and the same shall be payable under the regulations of these presents; and every such share shall be forfeited to the society, unless an owner thereof shall be ascertained and become a member of this society, in respect thereof, within six years next after the death, or as the case may require, declaration of bankruptcy, or adjudication of insolvency of each such proprietor, respectively, or unless the society shall have purchased the same pursuant to the clause or provision next hereinafter contained.

109. Provided always, and the directors for the time being of this society shall, within three calendar months next after the application and request in writing, at any time within the said six years mentioned in the next preceding clause, of any such executor, administrator, legatee or assignee, not choosing to hold such share or

shares, pay to him, her or them, out of the capital of the proprietors' guarantee fund, the full value, at the time of such application, of the share or interest of the proprietor whom he represents, of and in the same fund, at a valuation to be made for the purpose of the directors for the time being, with interest on such value at the rate of not exceeding 4l. per cent. per annum, from the date of the valuation, to be made as aforesaid; and on payment or tender thereof, all right and interest of such executors, administrators, legatee or legatees, assignee or assignees, respectively, in respect of each such share, respectively of and in the stocks, funds, property and effects of this society, shall absolutely cease and determine; and every such valuation so to be made as aforesaid, shall be binding and conclusive on all persons whomsoever, but no premium shall in such case be paid or payable in respect of any such share; nor in such valuation shall any compensation be made or demandable in respect of any past, future, or supposed, or expected profit, or share of profit arisen, or made, or expected to arise or be made by the society, or any other profit or benefit not previously added to and made part of the proprietors' guarantee fund.

The deed contained also this further provision, "That the present number of directors shall be seventeen, but shall, upon the first two vacancies, be reduced to fifteen, and shall never afterwards be more than fifteen; and that no person shall hereafter be qualified or eligible to be a director of the society, unless he shall be the holder of fifty or more shares of 50l. each in the capital of the society."

From the affidavits it also appeared, that for some time previous to the notice of the 23d of February being

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given, *Litt* was a director of the company, and that he continued to act as director up to the time of his bankruptcy, having no other shares than the 100 alleged to be assigned as aforesaid to the petitioner. Also, that on receipt of the notice the same was put up, in the office of the company, with the other letters and written communications received by the company about that period; and that a memorandum was written in pencil mark, in the share ledger of the company, opposite to the account of *Litt* therein, in the following words:—"Notice of assignment of 100 shares, *Masterman & Co.*" And a similar memorandum was placed against the eighty shares of *Harrison*. And that, in the book of the company called the non-assurance time book, a memorandum in pencil mark was written against the 100 and 80 shares respectively as follows:—"Not to be transferred, *vide Haddan & Co's.* notice of the 23d February, 1831." And it further appeared to be the uniform course and practice of the company, in the case of transferring of shares by any proprietor, for a written application to be made to the office for permission to transfer a few days before a board-day; which application was laid before the board, who thereupon signified in the minutes of their sitting whether they approved or not of the proposed transfer: and, in the affirmative, a deed for effecting the same was made out and prepared in the office of the company, according to a printed form kept and uniformly used in the office: and the several parties to such deed subsequently executed the same, and then the same deed would be pasted in a book kept by the office for that purpose exclusively; whereupon the shares whereto the deed related would be immediately transferred in the company's books into the name of the transferee, who

would thenceforth appear in the public books of the company, and would be recognized as the proprietor of such shares. Such forms were never observed by the petitioners; but the same shares, for several years previous to, and up to the time of, their bankruptcy, always stood in the names of *Litt* and *Harrison* respectively in the public books of the company as the proprietors thereof.

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Mr. *Blackburn* and Mr. *Montagu* for the petitioners. This case is very distinguishable from that of *Ex parte The Lancaster Canal Company*(a). In that case, not only was the mode of transfer which was prescribed by act of parliament unobserved, but, being a transaction between the company and one of its body, every means was taken to conceal the fact of the attempted transfer from the knowledge of the world: the party had power to receive the dividends, and appeared in the books of the company as the owner of the shares, and there was nothing to induce a suspicion that any other party than the bankrupts had an interest in them. Here, however, there is no act of parliament prescribing a particular form of transfer. It is a mere private deed of the company, not affecting the public, because the public as such have no power to know its contents. It is made for the mere convenience of the company, and cannot at all events affect the rights of a transferee, who had not notice of its contents. The transferees are wholly independent and aloof from the company, and every means are taken by them to make known to the world the fact of their claim upon the shares; and it would have been impossible, from the mode in which the petitioners claim

(a) 1 Dea. & Chit. 411; S. C. Mont. & Bli. 94.

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was entered in the company's books, for any party inquiring as to the title of the bankrupts to the shares in question, to have been deluded into the supposition that the bankrupts had title, or at all events a clear and unincumbered title to them.

The further argument on behalf of the petitioners was stopped by the Court, who called upon

Mr. *Swanston* and Mr. *Rogers*, for the assignees, the respondents. It is not pretended that the attempted transfer in this case could pass any thing more than an equitable interest in these shares, which in themselves are mere chattel interests. In the first place, therefore, we contend that this Court, taking on itself the functions of a Court of Equity, and guiding itself in the exercise of those functions by the doctrines maintained in other Courts of a similar jurisdiction, will not decree, in effect, the specific performance of a contract concerning mere chattels, but will leave the petitioners to recover what damages they can by means of their legal remedies^(a). Secondly, granting that the Court will interfere upon such a subject, it cannot do so in this case, because up to the time of the bankruptcy these bankrupts remained in possession, we say, of these shares as reputed owners, and therefore they pass, by the 6 *Geo.* 4. c. 16. s. 72., to the assignees. It is undeniably true, that the forms required to be observed upon the transmutation of shares by the rules of the company have not been complied with, as between the bankrupts and the company; and therefore, as between them and the public, the former remained owners, or at least apparent owners, up to the period of

(a) See cases on this subject, 1 Chit. Index, p. 70, 2d edit.

their stopping payment. Until the rules of the company were observed the bankrupts continued the legal owners; and having been actual owners, when they ceased to be such it behoved them to do other acts than they have observed, to divest themselves of the reputation of ownership. *Lingard v. Messiter (a)*, *Ex parte Lancaster Canal Company (b)*. It is very true, that notice of the transfer had been given, and an acknowledgment of the receipt thereof and other cautionary observations were entered and made in the books of the company. But it is equally true, that those books were private, and unknown and unopen to the public. The bankrupt, after the company had notice of the transfer of all his shares, continued to act as director; and to entitle him to do so, the rules required him to have fifty shares. And yet it is in evidence, that he never had any shares other than the 100, which are said to have been transferred to the petitioners. Clearly, therefore, the company could not have considered *Litt* otherwise than as still being the owner of the shares, or they could not have allowed him to continue acting in the ordinary routine of director. This case is parallel with that of *Ex parte Lancaster Canal Company (c)*, the only apparent difference being, that the mode of transfer in the one case was prescribed by act of parliament, and in the other by the company's deed. The act of parliament in that case was, however, merely a private act, and is therefore not to be considered more potent or binding on the world than a private deed. In fact, the rules contained in the deed must be as strictly observed as those in the act above mentioned. The bankrupts, therefore, remaining in the exercise of all the

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(a) 1 B. & C. 308; S. C. 2 Dow. & R. 495. (b) 1 Dea. & Ch. 411.

(c) 1 Dea. & Ch. 411; S. C. Mont. & Bli. 94.

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functions of owners, these shares pass to their assignees as property found in their reputed ownership at the time of the bankruptcy.

Mr. *Blackburne* was not required to reply.

ERSKINE, C. J.—I am of opinion that the petitioners are entitled to the relief they seek by their petition. It is objected that the bankrupts continued legal owners, because it is said the assignment to the petitioners was invalid—that this Court will not direct specific performance regarding a subject which is in its nature a mere chattel interest,—and lastly, that even if the transfer to the petitioners were effectual, yet that by the bankrupts remaining, as the assignees contend they did, in the apparent ownership, the shares pass to the assignees under the 72d section. It is said, that inasmuch as the forms of transfer pointed out by the company's deed were not observed, therefore the property was not legally assigned to the petitioners. It is not contended that the forms were complied with. But it was competent for the bankrupts to assign either a legal or an equitable title. At law, to assign the absolute ownership, the forms prescribed by the deed must have been observed. This was omitted. But the bankrupts have assigned the beneficial interest in equity; and although Courts of Equity may not in general interfere in cases of mere chattel interests, yet that is only where the party, against whom relief is sought, remains solvent, and against whom, therefore, an adequate remedy or compensation can be had at law, in the shape of pecuniary damages. But where such party is insolvent, as in this case, all remedy at law in the shape of damages is hopeless, and therefore it is not

only the duty but also the constant practice of the Courts to give their aid by specific performance. Every case of equitable mortgage in bankruptcy falls within this principle. Here an equitable transfer has been made, and the petitioners have acquired an equitable ownership, of which it would be unjust to deprive them. With regard to the question of reputed ownership, or order and disposition, that is completely and fully met. The bankrupts had assigned, by a perfect deed, all their interest in these shares to the petitioners, and notice of this deed was duly given to the company. Upon the receipt of it they make entries of the transaction, and of the notice having been received, in their books; and by the form of such entry, the company evince their knowledge that the bankrupts could not give any other person an interest in such shares, so long as the claim of the petitioners continued unsatisfied. These facts constitute the marked distinction between this case and that of the *Lancaster Canal Company*. In that case there was no real intention of the parties to alter the ownership: on the contrary, the object was, that the bankrupt should there continue as the ostensible owner:—there was no entry in any of the books of any notice of a change of ownership, or of any transmutation of the property. The public were, and were intended to be deceived, and a fraudulent and collusive reputation of ownership was retained to the bankrupt. In this case, every ingredient is the very reverse, and any person making inquiry at the office as to the ownership could not but at once have learnt the true state of the case, namely, that the bankrupts were not the true owners.

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Sir JOHN CROSS.—The reputed ownership clause is

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one of so penal a nature, that I think the assignees, to entitle themselves under it, are bound clearly to prove the case within it. My feeling has long been, that the construction of that clause has been carried much too far in favour of assignees. They are bound, as I before said, clearly to establish that the bankrupt either was the true owner, or was the apparent owner, of the property to which they advance claim. How do they in this case make out a reputation of ownership? Their strongest point is, that *Litt* continued to act as director. That circumstance is not entitled, I think, to much weight, since it could only be known to one or two clerks in the office of the company, while any one really desirous of knowing the truth might, by the slightest inquiry, have learned that the true ownership was in the petitioners. I am therefore of opinion, that the prayer of this petition ought to be granted.

Sir G. ROSE.—I think this is quite a clear case in favour of the petitioners. In regard to specific performance of contracts concerning chattels in equity, the Courts have always been guided by the consideration of, whether Courts of Law could give as full a compensation for the injury arising from non-performance, by pecuniary damages, as they could themselves afford by directing completion of the contract in specie. Thus, if the contract be for the sale of timber, and the amount to be recovered in the shape of damages at law would as fully compensate as the possession of the identical timber contracted for, Courts of Equity would refuse to interfere: but if it were made to appear that no other timber would suit the party complaining as well, there they would

decree specific performance (a). And, indeed, Courts of Equity have of late years shown an inclination to break through that rule regarding mere chattels and chattel interests. This may be seen from the case of *Doleret v. Rothschild* (b). Here, it is obvious, a Court of Law would give but the shadow of compensation, owing to the intervention of bankruptcy. This Court is therefore the proper tribunal; and specific performance is the only adequate remedy for the petitioners. Had there been any doubt upon the point of reputation of ownership, the assignees should have the benefit of it, and the Court would not interfere. But I apprehend there is none. The rules of the company may be proper and binding among themselves, but neither those rules nor that which the company choose to do, with regard to the allowing an unqualified person to act as director, can affect an equitable assignee of the shares. The rules cannot alter the ordinary incidents of such property. The sole question in all these cases is, was notice of the transfer given to the office? All turns upon that. Even if a bare notice had been given without more, even a verbal notice without any entry whatever in their books, it would have been sufficient for the petitioners. Suppose it had been the case of trustees or executors, or the like, the mere notice attaches a liability on the specific property, and imposes on a party seeking to set up an adverse right the duty of further inquiry. And such notice in the case of policies has always been held to prevent the operation of the reputed ownership clause. In this case the right is much more clear, for the books of the company not only

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(a) *Withy v. Cottle*, 1 Sim. & S. 174; S. C. Turn. & R. 78; *Burton v. Lister*, 3 Atk. 383.

(b) 1 Sim. & S. 590.

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show the notice, but also contain an acknowledgment of ownership in the petitioners. The *Lancaster Canal* case is in every respect widely different from the present, and I am far from conceding to the respondents, that there is no difference between the public operation of an act of parliament, even though a private act, and a joint-stock company deed, as in the case before us.

The petition was therefore granted, and the usual order in cases of equitable mortgage made,—the petitioners to be at liberty to bid.

Ex parte WILLIAM HENRY DOUGLASS, Esq. Barrister at Law—In the matter of WILLIAM ELLIS.

April 26.

A country fiat having been directed to three barristers, under the 1 & 2 Will. 4. c. 56., the solicitor neglected (on account of the expense) to summon one of them, the petitioner, who throughout evinced his willingness and claimed the right to attend. *Held*, that the Court had jurisdiction at the instance of the barrister to interfere: and ordered, that the solicitor should summon such barrister in future, and recompence him for all fees which he would otherwise have received.

THIS petition stated, that the petitioner was a barrister at law, residing at Fareham, in the county of Southampton; and was, in the year 1833, duly appointed by the Lord Chancellor, to be a Commissioner of bankrupts for the three several districts of Portsmouth, Winchester, and Basingstoke; and previously to his appointment as a Commissioner for the three several districts aforesaid, was required by the authority of the Lord Chancellor, and accordingly undertook, to reside within the county aforesaid, and to abstain from practising in matters relating to bankruptcy, save as a Commissioner; and had ever since his said appointment continued to reside at Fareham aforesaid, within the said county, and hath not acted or practised in matters of bankruptcy,

save as a Commissioner; that *Richard Missing*, of Titchfield, in the said county, Esq. and the petitioner, were the only barristers appointed commissioners of bankrupts within the districts aforesaid; that in the month of December last a fiat was issued against the said bankrupt, then a trader residing in the parish of Portsea, in the said county, and within the district of Portsmouth; that the said fiat was obtained by *William Minchin* of Portsea aforesaid, gentleman, either on his own application or on that of his agent in London, for and on the petition of a creditor of the said bankrupt, *George Lamburn Greetham*, gentleman; that the said fiat was directed to the said *Richard Missing* and the petitioner, and *Joseph Paddon* and *David Compigne*; and that the petitioner, though expressly named in the said fiat, and willing to be an acting Commissioner in the said bankruptcy, did not receive any summons to attend the first meeting of the Commissioners, nor had he since that period received any summons to attend any subsequent meeting; that the said bankrupt was adjudged a bankrupt by some of the Commissioners in the said fiat named, and notice of such adjudication was given in the London Gazette, whereby three public meetings were appointed to be held; that the petitioner (although he did not receive any summons as aforesaid) did nevertheless attend the first of the said public meetings, and did then and there (having first, in the presence of the said *Richard Missing*, one of the said Commissioners, taken the oath prescribed and required by the statute 1 & 2 Will. 4. c. 56. s. 14. and signed a memorial thereof,) declare his willingness and intention to attend the meetings, and to act as a Commissioner in the said bankruptcy; that the petitioner, notwithstanding his said declaration,

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was addressed by the said *William Minchin*, who informed him, in the name and on the behalf of the creditors, that he could not, on account of the expense, be permitted to act under the fiat, and the petitioner was thereupon excluded from acting; that the said *William Minchin* was solicitor to the assignees; that by the 6 Geo. 4. c. 16. s. 23. it was among other things enacted, "That at every meeting under any commission to be executed in the country, wherein any one or more of the Commissioners named may be a barrister or barristers, such barrister or barristers, or as many of them as shall be willing to attend, not exceeding three, at each meeting, shall be the acting Commissioner or Commissioners, and shall be entitled to his or their summonses and fees accordingly in priority to any of the other Commissioners in the said commission named;" that the conduct of *Minchin* in neglecting to summon the petitioner as a Commissioner, and in excluding him from acting as such, was not only in direct opposition to the statute, but was also an indignity to the petitioner, and an invasion of the rights of the bar; the petition therefore prayed that the Court would direct that *Minchin* should, from time to time, summons the petitioner as a Commissioner under the fiat, in priority to any other of the Commissioners therein named who were not barristers; and that the Court would direct that *Minchin* should forthwith pay the petitioner all fees which he could have claimed as a Commissioner under the said fiat, had he been summoned to attend and had he acted as such Commissioner; and that *Minchin* should also pay the costs of this application.

Mr. *Moultrie*, for the petitioner, stated the facts and referred to *Ex parte Kilsby* (a).

(a) 3 Dea. & Ch. 19.

Mr. *Goodeve* for the respondent, Mr. *Minchin* the solicitor. In the case of *Ex parte Ward*, which was heard before the Lord Chancellor, August 1832, on appeal from the Vice-Chancellor, who had dismissed the petition, the petitioner was a barrister residing at Oxford. A commission had, in pursuance of Lord *Loughborough's* General Order, 12th August 1800, been directed to two barristers, residing at Oxford, and to three solicitors; but the petition stated that one of the barristers did not reside within the usual limits, and not being a practising barrister would not (as was well known) attend, and that therefore the insertion of his name was a mere evasion of the general order. The petitioner, being willing to act, prayed that his name might be inserted in the commission. But the Lord Chancellor confirmed the Vice-Chancellor's order, on the ground that the creditors, and not the petitioner, were the only persons entitled to complain: and the petition was dismissed with costs, although, as the Lord Chancellor observed, the petitioner's motives appeared to have been exceedingly proper in presenting the petition. That case was decided on the law as it stood prior to the 1 & 2 *Will.* 4. c. 56. The object of the constitution of the Court of Review was, and the only jurisdiction given to it is, to see justice done between the creditors and the bankrupt's estate. It was never intended as a tribunal for the redress of wrongs done to the bar. Had any injury been shown as likely to result either to the creditors or to the bankrupt, by the exclusion of the petitioner, then indeed the Court might have been justified in its interference; but even that would be questionable, unless the petition had been presented by a creditor or by the bankrupt. [Sir *J. Cross*. The petitioner comes here to complain of the conduct of

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the solicitor to the fiat, in his mode of executing his duty in regard to it. Is not that alone sufficient to warrant this Court exercising a jurisdiction in the matter?] I submit not, inasmuch as the complaint is made by a party who has no interest whatever in the bankrupt's estate.

Mr. *Moultrie*, in reply, was stopped by the Court.

ERSKINE, C. J.—In *Ex parte Ward*, and indeed in all cases of Commissioners appointed in the country under Lord *Loughborough's* Order, it was necessary that the names of two resident barristers should be inserted in the commission; but there was not any right in any individual barrister to have his name so inserted, if there happened to be three or more residing in the same neighbourhood. But with those appointed by virtue of the authority vested in the Lord Chancellor, under the 1 & 2 Will. 4. c. 56. s. 23., the case is very different. Among those the present petitioner is one. He has been specially selected by the Lord Chancellor to act in the particular district. And it was the duty of the solicitor to abide by the directions in the fiat, which specially named the petitioner as a Commissioner, and to summon him for that purpose. The solicitor must have been aware of his duty; for he could not but have observed the distinction in the present practice, inasmuch as before the 1 & 2 Will. 4. the solicitor himself named the Commissioners. Here the petitioner, from his conduct throughout, testified his willingness to act as Commissioner, and the act complained of is not a mere omission to summon him; but, although he comes to the meeting and claims the right, yet nevertheless the solicitor by his conduct obliges the

petitioner to retire from acting. The solicitor would have been guilty of impropriety had he simply omitted to summon the petitioner, but he goes beyond that, and is still more to blame in his subsequent conduct. My judgment therefore is, that the petitioner be declared entitled, according to the prayer, to the fees which he would have received, had he been properly summoned and allowed to act; these the solicitor must pay out of his own pocket, and also the costs of this application, so as to disburthen the estate from the effect of the solicitor's own injudicious conduct.

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Sir J. CROSS.—I fully coincide in the opinion just expressed. There is no doubt of the propriety of this petition, or of the fitness of the petitioner for the office which he seeks to exercise, or else he would never have been appointed by the Lord Chancellor for that purpose.

Sir G. ROSE.—Our decision against the solicitor personally will not, of course, prejudice him in his right to fall back on his clients for indemnification, if he can show that he acted entirely under their instructions. Although the order of Lord *Loughborough* is, that two barristers shall be summoned, yet, being directory and not imperative, I do not say that, under that order, it is obligatory on us to interfere in all cases. But in this case it is our duty to see that the fiat is properly executed according to its tenor, unless good ground had been shown to the contrary. The petitioner ought to have been summoned, and, in strictness, all that has been done under this fiat, is irregular, by reason of the solicitor's omission, and ought to be done over again.

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That is the only way, I think, in which we can make an adverse order.

But, by consent, the order was,

That the proceedings should stand, the solicitor undertaking to pay the anterior fees to the petitioner, together with the costs of the application, and to summon the petitioner to attend all future meetings.

Ex parte CHARLES PORTER—In the matter of JOHN
WILLIAM DEACON.

June 4.

A. and B. give a joint promissory note, upon which money is lent by C. to them, and by them to D. B. becomes bankrupt, and A. is obliged, after the bankruptcy, to pay the note. Held, that he is not a surety for B., but that A. and B. are principal debtors or co-sureties, and therefore that A. could not prove for a moiety of the note against B.'s estate.

THE petition in this case stated, that in the year 1833, the bankrupt applied to the petitioner to join him as security for the repayment of 275*l.* to the Stamford and Spalding Joint Stock Company, which sum the company were about to lend him, for the purpose of advancing the same to a third person of the name of *Mary Gilbert*; and for that purpose they gave a joint and several promissory note in the following form:—"275*l.* We jointly and severally promise to pay" (the two trustees of the company) "or order on demand, the sum of 275*l.*, with lawful interest from the date thereof, being for value received.—*C. Porter, J. W. Deacon.*" The company upon this note placed the money into the hands of the bankrupt, and he paid it over to *Gilbert*; and the bankrupt and the petitioner were debited with the amount in the books of the company. The fiat issued against *Deacon*, the bankrupt, in September 1834, and *Gilbert* became insolvent. The petitioner had been

obliged to pay the £75l. and interest to the company, and he had therefore applied to prove the moiety of the note against *Deacon's* estate, but his proof had been rejected by the Commissioners. The petition therefore prayed that such proof might be received.

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Mr. Wood, for the petitioner. We maintain the right to make this proof, on the ground that the petitioner was a surety for the bankrupt to the extent of one moiety of the promissory note, and therefore we seek to prove under the 6 Geo. 4. c. 16. s. 52 (a). It is not like the case of *Clements v. Langley* (b), in which it was virtually determined, that a surety paying the debt after the bankruptcy, could not prove any part of the sum paid against the estate of his co-surety: because here the petitioner and the bankrupt were not co-sureties, but both principal debtors. The company had nothing to do with *Gilbert*. They trusted the petitioner and the bankrupt as their debtors: so that no party existed

(a) That section is as follows:—"And be it enacted, that any person who at the issuing of the commission shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt, or any part thereof, in discharge of the whole debt (although he may have paid the same after the commission issued), if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said commission which such creditor possessed or would be entitled to in respect of such proof; or if the creditor shall not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail as aforesaid, after an act of bankruptcy committed by such bankrupt; provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed."

(b) 2 Nev. & Man. 269.

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as principal, for whom they could be said to be co-sureties. Both were jointly and severally bound to the company as principals, and each was in equity bound to the other for one moiety of the whole debt. Each may therefore be said to have been a surety for the other, but they cannot be said to be co-sureties. The petitioner has been called upon not only to pay his moiety, but also the moiety due from the bankrupt, and that gives the petitioner a right to prove the amount of it against this estate. This case is very similar in principle to that of *Ex parte Yonge*(a), and the observations of Lord *Eldon* in that case should guide this Court in granting the relief we seek. There (b) Lord *Eldon* says, "If it is necessary to answer the moral justice of this case, the late act of parliament (c) would give considerable aid. If that act is understood as applying only to sureties strictly, it is impossible to represent the *Botfields* as sureties; but many cases fall within the reach of the words of that act 'liable to,'—cases which I know that act was intended to comprehend. The drawer of a bill of exchange, for instance, is not strictly a surety for the acceptor. In general cases, the acceptor is primarily liable upon the bill; and the drawer may be in the nature of a surety: but if the real transaction is that, as between them, the drawer shall be first liable, after what has passed at law and here with reference to the acceptor having or not having effects, I state from perfect recollection, that, when that bill passed, it was in contemplation, where justice required it, that the acceptor should be considered a person liable for the drawer; but farther the circumstances of each are looked

(a) 3 Ves. & B. 31.

(b) Ibid. p. 39, 40.

(c) 49 Geo. 3. c. 121. s. 8.

at ; and if a person has become liable, under this section (a) of the act, he is to have relief." In that case, therefore, though as regarded the principal creditor, both the acceptor and the drawer were to be looked upon as principal debtors and co-sureties, yet, as between themselves, they were considered the one as surety for the other, and as such the one was held entitled to prove against the other.

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Mr. *Swanston*, for the assignees, was stopped by the Court.

ERSKINE, C. J.—I do not conceive it possible to grant this application as a case falling within the principle of relief pointed out by the 6 *Geo.* 4. c. 16. s. 52. At the issuing of the fiat, the petitioner could not be said to be surety for the bankrupt. There was no debt at that time due between them, each was liable for the whole, each being a principal debtor ; and certainly nothing was then due to the petitioner from the bankrupt. The words of the act are, " that any person who at the issuing of the commission shall be surety, or liable for any debt of the bankrupt, &c., if he shall have paid the debt, although after the commission," shall be entitled to do certain things. Such was not the position of the petitioner. The case of the drawer and acceptor of a bill is very different ; there *primâ facie* the drawer is only secondarily liable, and the one is regarded as surety for the other in most respects.

Sir J. CROSS.—I entirely concur. This is not a case of suretyship in any way between the petitioner and

(a) 49 *Geo.* 3. c. 121. s. 8.

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the bankrupt, but each party was co-debtor and primarily liable.

Sir G. ROSE.—To entitle a party to prove as surety, the liability may be incurred either before or at the very moment of the bankruptcy; but if it happen after that latter period, it does not fall within the act. If the petitioner had been called upon, and had paid this debt previous to the bankruptcy of *Deacon*, he might have been in a situation to prove; but that not having been the case, and as it is clear that he had no cause of action or suit in equity before the bankruptcy, he can be in nowise entitled to prove, unless he can bring himself within the situation of a surety. I cannot, however, regard the petitioner as a surety, as he was liable to the bank for the whole debt; and I think the only remedy left him is an action against the bankrupt for contribution.

The petition was therefore dismissed.

Ex parte SAMUEL FORFIET GRAY.—In the matter of
SAMUEL FORFIET GRAY.

4th June.

On the formation of a partnership between A. & B., A. lends to B., B.'s lessee of the premises for a term of 36 years from proportion of

THE petitioner, the bankrupt, in June 1829, carried on business as a chemist in New Bond Street, being A. & B., A. lends to B., B.'s lessee of the premises for a term of 36 years from proportion of the capital, and A. is to receive it again, and interest thereon, out of B.'s share of the profits. B. assigns property to C. in trust to secure to A. the money lent by him, and covenants to pay C. the amount. After an act of bankruptcy by B., known to A., A. files a bill for a dissolution and account of partnership and for payment of the debt:—Held, that A. and C. could not, after such election, sue out a fiat against B. founded on that debt, A. having elected his remedy and treated the debt as mixed up with the partnership accounts.

Semble, that a trustee alone cannot issue a fiat against the debtor, especially if the *cestui que trust* has by his conduct equitably precluded himself from acquiescing in such proceeding.

The principle of *Ex parte Notley*, 3 Dea. & Chit. 367; S. C. 1 Mont. & A. 46, confirmed. *Quere*. Whether an act of bankruptcy, by denial of the debtor to the *cestui que trust*, is good to support a fiat, the trustee being the proper party to demand and receive the debt? *Per* Sir G. Rose.

March 1828, and entitled to the furniture and stock in trade on the premises. In August 1829, a commission issued against him, and *William Welden* and *James Hannen* were chosen assignees. In October following, by arrangement with the assignees and consent of creditors, the petitioner purchased of the assignees his lease and good-will, together with the furniture and stock in trade, for 2200*l.* *Robert Hodges* and *William Farr* became his sureties in a bond for the amount. This was effected after the petitioner had obtained his certificate under that commission. It appeared, that *Hodges*, thinking the business might be rendered very lucrative, proposed to advance the 2200*l.* and to become a partner with the petitioner, and that the 2200*l.* should be considered the capital of the partnership, and one moiety of the 2200*l.* to be considered his capital, and the other that of the petitioner, to be repaid to *Hodges* out of the petitioner's share of the profits. And accordingly a deed of partnership, dated 3d November 1829, was entered into, whereby it was agreed, that they should become partners for the term of 14 years; that the 2200*l.* to be paid by *Hodges* to the assignees should be the capital, and for 1100*l.* thereof *Hodges* should take 5*l.* per cent. per annum, (being the proportion of capital paid by him for the petitioner,) until the same should be repaid to *Hodges*; and in case *Hodges* should at any time, with the consent of the petitioner, advance or lend to the co-partnership any further sum, that the business, stock in trade, and gains, &c. should be liable to its repayment, and also to the 1100*l.* and interest; and if the gains &c. should fall short to pay the monies lent, then the petitioner was to pay the 1100*l.*, and one

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moiety of any monies lent, with interest, out of his separate estate. And it was further agreed, that within the space of two months after the expiration of the partnership term of 14 years, an account in writing should be stated of all the partnership debts, effects and credits, and that the profits and stock in trade &c. should be divided, making provision for payment of all the partnership debts. It was further provided, that *Hodges* should have the option of putting an end to the partnership at any time, on giving the petitioner one month's notice in writing; and if *Hodges* should die before the end of the partnership, his executors should stand in his place as to his moiety. But if *Hodges* should determine the partnership as above-mentioned, or the petitioner should die before the expiration of the partnership, then *Hodges*, his executors &c. should have and take all the stock and every thing belonging to the partnership, and within 21 days after the expiration of the said notice, or after the decease of the petitioner, execute a bond for payment, within three months, to the petitioner or his executors, of the full amount of the share of the capital and joint stock, and of the gains and profits up to the expiration of the notice or death of the petitioner, with sufficient indemnity to the petitioner or his executors &c. against all debts &c. owing by the said partnership.

It appeared, that by another indenture executed on the following day, the petitioner assigned the said house and premises, household goods and furniture, by way of mortgage, to *Jamas Hannen*, in trust for *Hodges*, for securing the 1100*l*.

It was further alleged in the petition, that in the commencement of the year 1835, *Hodges* became de-

sirous of possessing the whole of the business, and of excluding the petitioner therefrom; and accordingly the petitioner received a notice from him, dated 12 February 1835, to determine the partnership according to the partnership deed. And *Hodges*, on the 13th March 1835, filed a bill in Chancery against the petitioner, thereby stating the indentures of partnership and mortgage, and praying that it might be declared that the partnership was dissolved as from the 12th March then instant, and that all proper accounts might be taken for winding up the same as between *Hodges* and the petitioner, on the footing of the indenture of partnership; and that it might be declared that the lease, subject to the mortgage thereon for securing the 1100*l.*, formed part of the partnership, and was liable to make good the debts owing to *Hodges* from the concern; that the lease might be sold, subject to the mortgage, and the proceeds applied as part of the partnership property; and that the petitioner might be decreed to deliver up all stock &c. in any way appertaining to the partnership, *Hodges* offering to pay all debts, and to secure to the petitioner what, if any thing, should prove to be due to him, and also praying an injunction and receiver.

On the 28th March 1835, *Hannen*, the trustee, as petitioning creditor, issued the present fiat against the petitioner, upon the following affidavit of debt. “*James Hannen* of &c., maketh oath &c. that *S. F. Gray*, of &c. is justly and truly indebted unto him, this deponent, in the sum of 1100*l.* for principal money due and owing from the said *S. F. Gray* to him, this deponent, upon and by virtue of a certain indenture of mortgage, bearing date the 4th November 1829, and made between *S. F. Gray* of the first part, *W. R. Hodges* of the second part, and

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this deponent of the third part, whereby the said *S. F. Gray* covenanted and agreed to pay the said sum of 1100*l.* to this deponent, at a certain day therein mentioned and now past. And this deponent further saith, that the said *S. F. Gray* hath become bankrupt within the true intent and meaning of some or one of the statutes in force concerning bankrupts, as this deponent believes. (Signed). *James Hannen*." Sworn &c.

The petition further stated, that at the time of issuing the fiat the petitioner was not indebted to *Hannen* in any sum whatever, except a balance of 4*l.* or 5*l.* for goods supplied to the partnership. And at the issuing of the fiat, the stock in trade, good-will, lease of premises, machinery, fixtures, &c. of the partnership, were of the value of about 9500*l.*, and they had since been valued under the fiat at 6073*l.*, and the debts owing from the partnership were about 1134*l.*; and that at the first meeting under the fiat, partnership debts to the amount of about 107*l.* were proved against the petitioner's estate. *Hannen*, through the means of *Hodges*, paying all these debts except one of about 5*l.*, was chosen sole assignee, but he had never proved any debt under the fiat. It was alleged, that *Hannen* was formerly a clerk of *Hodges*, and was now in copartnership with him; and that the solicitor who issued the fiat was not *Hannen*'s usual solicitor and attorney, but was the solicitor usually employed by *Hodges*. On the 22d April 1835, *Hodges* and *Hannen* caused the lease to be sold by auction, under an order of the Commissioner, and one of the conditions of sale was, that the purchaser of the lease should take the furniture, fixtures, stock in trade, &c. &c. at a valuation. An attorney of the name of *Sherwood*, of Chichester, was

the purchaser for 100*l.*, but it was alleged, that he was indemnified in regard to such purchase by the same solicitors who issued the fiat, and that the lease and good-will &c., were sold at a great undervalue. The petition alleged, that *Hodges* caused *Hannen* to issue the fiat for the sole object of obtaining the entirety of the business, and the full benefit of the lease to himself; and prayed, that the fiat might be annulled, and that *Hodges* and *Hannen* might be restrained from completing the sale or from assigning the lease, and from selling and disposing of the partnership property; that it might be ascertained what diminution in value the partnership property had sustained by reason of the fiat being taken out; and that *Hodges* and *Hannen* might be ordered to make good such damage, and for costs, and for the assignment to the petitioner, or impounding in Court of the petitioning creditor's bond.

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Mr. *Koe* and Mr. *Bethell*, for the petitioner,—after stating the facts, and contending, on behalf of the petitioner, that under the circumstances above-mentioned, the alleged debt of *Hannen* was not a debt of a nature sufficient to support the fiat, and that the fiat was taken out at the instigation of, and in fact by, *Hodges*, merely for the purposes above alleged, and that the amount of the debts, if any, payable to *Hodges* by the petitioner, could only be ascertained by realizing the partnership property, and taking the partnership accounts in the manner sought by the bill already filed by *Hodges* against the petitioner,—were stopped by the Court.

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Mr. *Swanston* and Mr. *Ching*, for the respondents. We contend that the debt is quite sufficient. It is quite distinct and wholly independent of the partnership, and unless the conduct of *Hannen* respecting the issuing of the fiat has been improper, this Court cannot on any grounds disturb it.

Sir G. ROSE.—There is no doubt that this is a good legal debt; but the question is, if we, sitting as a Court of Equity, should allow such a debt, surrounded by such a state of circumstances as this is, to sustain a fiat.

Mr. *Swanston* and Mr. *Ching*. In that we acquiesce; but having an admitted legal debt, the cestui que trust not opposing, but, as the petitioner himself alleges, having acquiesced, what circumstance of objection is there to our issuing the fiat? Beyond question where a legal debt exists, in right of it some party or other is entitled to sue out a fiat. The only question then is, who is that party in this case? The creditor must, it has long been decided, be a legal creditor: *Hodges*, therefore, is not that party, because he is the cestui que trust, the mere equitable creditor (*a*). The cestui que trust and trustee cannot do it conjointly, because they cannot swear that the debt is due to both of them jointly. *Hannen* alone is, therefore, the proper party. He is the legal creditor in whom all the remedies (especially the legal remedies, and bankruptcy is one among

(*a*) The assignee of a bond, being in law merely entitled equitably, cannot issue a commission; *Medlicot's case*, 2 Stra. 899; *Ex parte Lee*, 1 P. W. 782. *Secus*, of assignee or indorsee of bill or other negotiable security; *Ex parte Lee*, 1 P. W. 782. See also *Ex parte Williamson*, 2 Ves. 251; S. C. 1 Atk. 82.

them) are vested. He has the legal debt due to him. *Hodges* could not sue for this debt at law, any more than he could alone sue out the fiat, because Courts of Law do not recognize cestui que trusts. He could not even be joined as plaintiff at law. Therefore it is that *Hannen* is the only party who can recover this debt; for it must not be lost sight of, that the right to issue a fiat is a legal remedy, it is a statutable legal execution in favour of, and to obtain the equal distribution between, all the creditors; and it is only through *Hannen* that *Hodges* can recover in any shape.

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ERSKINE, C. J.—Granting that this is a good legal debt, does it follow that every legal debt is a good petitioning creditor's debt to support a fiat?

Sir G. ROSE.—I very much doubt whether a petitioning creditor's debt can be such as cannot be afterwards ripened into proof by the same person.

ERSKINE, C. J.—And in *Ex parte Dubois* (a) it was held, that a trustee cannot prove a debt alone, but that the cestui que trust must join in the proof.

Mr. *Swanston* and Mr. *Ching*. In *Ex parte Yonge* (b), it was determined, that though an equitable debt may be proved, it cannot operate as a good petitioning creditor's debt. Therefore *Hodges* could not have been petitioning creditor.

Sir J. CROSS.—It has been held, that a factor, who sells goods in his own name, without a *del credere* com-

(a) 1 Cox, 310.

(b) 3 V. & B. 40.

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mission, is a good petitioning creditor against the purchaser, although he has (without more) communicated the name of the purchaser to his principal; but he ceases to be so when the principal has agreed with him to consider the purchaser as his debtor, and has taken steps for recovering the debt directly from the purchaser (a). So if the obligor of a bond take out a fiat having assigned the bond, it appearing he has done so, can he afterwards prove the debt, without the assignee also joining?

Mr. *Swanston* and Mr. *Ching*. But does it necessarily follow that the trustee alone issuing the fiat renders it bad? If you say that a trustee cannot alone issue a fiat, you, in this case, refuse to *Hodges* one of the legal rights to which he is entitled through the medium of *Hannen*, his trustee. The sole object of the introduction of the cestui que trust or assignee, in this kind of case, into the proof is, that the Court may see that the trustee or obligor has the equitable right also to recover,—that he has not been discharged or paid.

Sir J. CROSS.—I never certainly met with a case where the trustee and cestui que trust joined in issuing a commission. And in regard to the question of subsequent proof, if, after the issuing the fiat, the obligor, for instance, in a bond, were part paid, that would not invalidate the fiat, but would merely affect the amount to be received by him in the distribution of dividends.

ERSKINE, C. J.—There is an equal absence of authority as to the power of a trustee alone to issue a com-

(a) *Sadler v. Leigh*, 4 Campb. 195.

mission. There is certainly none in print in favour of such a proposition (a).

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Mr. *Swanston* and Mr. *Ching*. Again, it is said there is a difficulty in sustaining this fiat, because the petitioning creditor's debt is so mixed up with the partnership accounts, that it is impossible to ascertain whether there is any, or if any, what amount of debt due to the petitioner as trustee for *Hodges*. But we, on the other hand, contend that this is a debt wholly independent of and distinct from the partnership accounts. It is a debt acknowledged by a separate and independent deed from that of the partnership articles. The deed of trust to *Hannen* is executed on a distinct day, and ascertains and fixes the amount of debt, and is totally distinct from the partnership accounts, and consequently creates a debt certain. This case is not unlike that of *Ex parte Notley* (b); there it was held, that money advanced to a trader to enable him to commence trade, in the profits of which the lender is to participate, is not a debt arising out of the partnership, and is therefore capable of supporting a fiat against the borrower. And Sir *G. Rose* there remarks (c), "This appears to be a distinct debt for which an action might have been brought notwithstanding the partnership. If, upon the formation of a partnership, one partner advance money to another partner to enable him to embark in trade, it is as distinct as if they were not partners." "Now, was there any thing that could have controlled the petitioning creditor, instead of issuing a fiat against the bankrupt, from pro-

(a) None. See Chit. Eq. Ind. 2d edit. p. 117, 118.

(b) 1 M. & A. 46; S. C. 3 D. & C. 367.

(c) 1 M. & A. 48; 3 D. & C. 372.

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ceeding to execution on the judgment" (a). So, in this case, we say that *Hannen* might have sued the bankrupt at law and recovered this debt, had not bankruptcy intervened.

Mr. *Koe*, in reply, was stopped by the Court.

ERSKINE, C. J.—This fiat is taken out on the petition of *Hannen*, who has sworn that the bankrupt is indebted to him in the sum of 1100*l.* under and by virtue of the indenture of the 4th November 1829. On production, however, it appears that the bankrupt is not in fact so indebted to him, but to him as trustee merely for *Hodges*, the bankrupt's partner. That deed recites the nature of the debt, and that it is due to *Hodges*, and bears certain reference to the articles of partnership made the day preceding. It has been decided in bankruptcy, that a trustee cannot prove a debt as due to himself alone, as in *Ex parte Dubois* (b), and that is on the ground that he cannot swear (except by legal fiction) that the money is due to him; but the cestui que trust must join, in order to show that the money has not been paid to him, the cestui que trust. Lord *Thurlow* in that case says (c), "The reason why a trustee is not permitted to prove the debt *alone* under the commission is, that he must swear to the debt being due to him; now the debt being only due to him in trust for another, it is rather too great a refinement for him to take such an oath, and if he swears the debt is due to him, as trustee only, that is not sufficient, for it does not with certainty appear that the debt has not been paid to the

(a) 3 D. & C. 372, 373.

(b) 1 Cox, 310.

(c) Ibid. 311.

cestui que trust. The cestui que trust must therefore join the trustee in swearing that no part of the debt has been paid or secured." So here, *Hannen* ought not to have sworn that the debt was due to him, and if he had stated, as he should have done, that it was due to him as trustee, the cestui que trust, *Hodges*, must have joined in the proof in order to show that the debt had not been paid. I do not say that this debt is not sufficient if an action at law had been brought. But we are here to consider it both legally and equitably, and it being determined that it is insufficient here without the concurrence of the cestui que trust, it is necessary to ascertain whether with such concurrence it would have been sufficient. For this we must look at all the circumstances surrounding the debt, and if we could find that, under those circumstances, that debt, with such concurrence, would have been proper, we might have been induced now to consider the debt as sufficient, and set the matter right in point of form. Looking at the partnership articles, we find that *Hodges* advanced the £200l. as the total capital of the partnership, and it was agreed that one moiety of that £100l. was to be considered lent to *Gray* as the capital brought in by him, and was, together with the interest, to be repaid to *Hodges* out of the profits of the business. *Hodges* was further secured by the deed of trust to *Hannen* on the subsequent day, which can only be looked upon as part of the same transaction. And looking at the whole, it seems that the right which *Hodges* otherwise might have had, to sue for repayment of the money advanced, was placed in abeyance till the winding up of the partnership accounts. Such was the effect, I think, of the agreement, and it also appears to me that this has been

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the view which *Hodges* himself has taken of his rights ; for after the dissolution of the partnership he files a bill in equity, praying that the dissolution might be confirmed, and that the partnership accounts might be taken ; thus treating the debt due to him as to be settled by this mode of proceeding. Even admitting that *Hodges* had the right of proceeding in another mode, either by action at law or by bankruptcy, before he filed his bill, by adopting this latter course, he has so dealt with it, as to have elected to have it settled under the proceedings in Chancery, and by taking the partnership accounts. It therefore is my opinion that *Hodges* could not have acquiesced in the issuing of the fiat, he has rendered himself incompetent to take that step, and therefore in no way of looking at it could *Hannen* be justified in the course he has taken.

Again, if we look at the other facts of the case, is it a fair and bonâ fide motive upon which this fiat is issued? It appears in evidence before us, that there are no separate creditors who are to profit by it. The mere object is to work a dissolution of the partnership. I therefore think this fiat cannot be sustained.

Sir J. Cross.—I am not prepared to go the length of giving my judgment upon the question of the right of a trustee to prove a debt, nor to determine whether he can sue out a fiat alone: but the facts of this case warrant our granting this petition without the necessity of determining that question. I therefore hope this case will not be cited hereafter as a precedent decisive upon that question of law. Upon that point I have not made up my mind. It is sufficient for me to see, 1st, that this debt has been so mixed up with the partnership ac-

counts, as that those accounts must be taken before another tribunal, before it can be ascertained what debt is due; and 2dly, that, there being but one separate creditor to the amount of 5s. only, the motive in issuing this fiat cannot be *bonâ fide*. It cannot have issued for the benefit of creditors, but is merely grounded on the desire of the trustee and cestui que trust, more securely to effectuate the dissolution of the partnership. To that extent I entirely concur in the judgment of his Honor the Chief Judge.

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Sir G. ROSE.—It must not be lost sight of that this Court never entertains a disposition to get rid of a fiat against an insolvent person, where there are any fair grounds on which it can be sustained. But I think we must annul the present one on a principle which we must be prepared to apply in all cases where we find, that although there is a legal debt, there is no equitable debt due, and that the motives of issuing the fiat are altogether improper. It is said that a fiat is the legal right of a creditor, to whom a legal debt is owing; of that there is no doubt, if the right is to be tried by a Court of Law. In this case there can be no doubt of *Hannen's* legal title. But here, constituted as we are, a Court empowered to act on principles, equitable as well as legal, and it not necessarily following that because a title is legal, that it is therefore sufficient to uphold a fiat—here, we must look at the debt legally and equitably, and unless we find both those qualities among its ingredients, it becomes our duty to pronounce it insufficient. A fiat, as in this case, on the petition of a mere trustee, might often issue at the office from the hurry of business. But I feel pretty certain that if it appeared

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to the officer that it was a trustee merely, without the acquiescence or concurrence of his cestui que trust, who was about to act in the character of petitioning creditor, the officer would require the opinion of the Court, and ascertain what the cestui que trust had to say to the matter, before he would issue the fiat. Here then let us ask what does the cestui que trust say? does he acquiesce, or is he capable of acquiescing? He is certainly here willing to co-operate with his trustee, but let us ask, can he acquiesce? Certainly not. Circumstances of equity, arising out of his own line of conduct in regard to this debt, intervene, and preclude him from the right of acquiescence; and, therefore, I for one should have adjudged this fiat to be bad if *Hodges* had joined ostensibly and actually in the proceedings of *Hannen* from the beginning, because I think that a petitioning creditor's debt should always be found to possess equitable as well as legal qualities. If this debt had been unmixed with the partnership,—if it had not been virtually stipulated that it should be estimated according to the state of the partnership accounts, upon the same principles as I explained to exist in the case of *Ex parte Notley*, *Hodges* and his trustee might have taken out a fiat founded upon that debt, and might, as an ulterior and separate proceeding, have obtained a settlement of the accounts by bill in equity. But as it is he has mixed up the matter in the Chancery proceedings, seeking thereby and having by that means the power to obtain all which forms the latent motive for the issuing of this fiat. Has he not already elected his remedy, and is he not bound by that election? The act of bankruptcy, of which he was fully aware, was prior to the filing of the bill; and yet he elects to pro-

ceed in Chancery. If he had commenced an action at law, it is very certain that the Court of Chancery would have restrained him from proceeding thereon by injunction. In every way, therefore, of looking at it, the fiat must be annulled. There might have been some question as to whether *Hodges* was bound by or had in fact made his election, if the act of bankruptcy had been subsequent to the filing of the bill; but as it was anterior, in my opinion there is none.

There is another point in this case, which seems hitherto to have escaped notice. It is this, that the act of bankruptcy was a denial by *Gray* to see *Long*, who called on behalf of *Hodges*, the cestui que trust. Was this a sufficient act of bankruptcy, *Hannen* being the proper party to demand the debt in law? I have some doubts whether this would be sufficient; but the necessity of deciding the point does not arise here.

Petition granted, and the fiat annulled with costs.

Ex parte JOHN HARDING, sole Assignee.—In the matter of CLARKSON LAMPLOUGH.

THE petition in this case stated, that by an order of this Court, made on the 30th April 1834, on the petition of *Joseph Jones*, after setting forth that *Jones* had, on the 5th April then last, preferred to this Court a petition in the above matter, praying that the fiat therein mentioned might be annulled at the costs of *Edwin Smith*

taken on that petition by reference, ordered to pay costs of that petition, and to pay balance in his hands, under trust-deed, to assignees, with interest at 4l. per cent. from date of order of reference, although there was no evidence of interest having been made. Costs of reference to be paid by estate.

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Trustee, under deed of trust, by a former petition, upholding the trust and praying to annul fiat, and failing, but consenting to have the account against him

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and *William Stansfield*, the petitioning creditors, and that they might be ordered to pay the costs of that application, and that in the meantime, until the petition could be heard, all further proceedings might be suspended under the fiat, it was declared, that the fiat was valid, and by the consent of *Jones* it was referred to the Registrar to take an account of the estate of the bankrupt received by *Jones* under a certain indenture of assignment, dated 7th August 1833, and in taking such account the Registrar was directed to make all just allowances, with liberty for him to examine all necessary parties; and it was further ordered, that the petitioner should be restrained from proceeding against *Jones*, as trustee under the said assignment, either at law or equity. The costs of the petition, when taxed, were directed to be paid out of the bankrupt's estate, and the question of *Jones's* costs, and also of the fund out of which all the costs were to be paid, was reserved (a). The petition went on to state, that the order was duly prosecuted, and Mr. *Gregg*, the Registrar, on the 22d December 1834, made his report, whereby, after stating that he had been attended by the parties and had certain affidavits, therein referred to, read, he stated that he had set forth a schedule of the property of the bankrupt received by *Jones* under the said assignment, which amounted to 542l. 10s. 3d., and he found that *Jones* had made payments on account, and which the Master allowed to the amount of 54l. 16s. 3d., and that a balance of 487l. 14s. was due to the petitioner, as assignee, from *Jones*.

The petitioner sought to charge *Jones* with interest on this balance, the same having been in his hands

(a) See the report of the case on that occasion, 3 Dea. & Chit. 697.

since September 1833, and prayed that *Jones* might be ordered to pay the costs of the former, and of the present petition, and of the reference to Mr. *Gregg*.

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Mr. *Bethell*, on behalf of the petitioner, insisted that as *Jones* had notice of the bankruptcy, he was a trustee, as regards all monies in his hands, for the assignees of the estate, and therefore the petitioner was entitled to demand 5*l.* per cent. interest.

Mr. *Swanston* and Mr. *Ching*, for the respondent *Jones*. We contend that our client is not bound to pay interest at all. The present petitioner claims from *Jones* adverse to the trust. How, therefore, can he designate *Jones* a trustee, and as such seek to charge him with interest? At all events, till the assignees were chosen under the bankruptcy, there was no party to whom he could make payment, and therefore, at most, he would only be liable to pay interest from the time of the appointment of trustee, and that at the most at the rate of 4*l.* per cent. But this is not a case for charging interest at all, nothing being adduced to show that any interest has been made.

Mr. *Bethell*, in reply, was stopped by the Court.

ERSKINE, C. J.—In regard to the question of costs, in the first place, the respondent *Jones* originally filed a petition to annul the fiat, upon the hearing of which, the Court thought it should be dismissed with costs. But as money was found in the hands of *Jones*, as trustee, in order to save litigation, and *Jones* consenting to be bound by the order, the consideration of the fund to

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pay the costs occasioned by that petition was reserved. I am now confirmed in the opinion I then entertained, that *Jones* should pay those costs, as he failed in the object of that petition. The course that the petition took in regard to the reference, was for the benefit of the estate, and the petitioner was thereby also saved costs of another application, and therefore it was for the benefit of all parties. The costs of the inquiry and of the present petition, should, I think, be borne by the bankrupt's estate.

As regards, secondly, the question of interest, *Jones* might very properly have kept the money, without payment of any interest, until this order was made, had he not then been a trustee, consenting to hold as trustee for the creditors under the fiat. There is nothing to show that he has not made profit; but beyond that he ought to show why he was not bound to, and did not make interest. He ought to have explained what he has done with the money, and in the absence of such explanation, I conceive he is bound to pay 4l. per cent., which is the ordinary rate of interest trustees are ordered to pay, from the date of the former order of 30th April 1834 (a).

Sir J. Cross.—I entirely concur in that judgment. It is clear that *Jones* ought to pay interest, if he have made any, and he does not (though ample opportunity has offered) show that he has made none, or why he has not done so.

Sir G. Rose.—The principle is very clear in this case. *Jones* became trustee for the bankrupt's estate

(a) See Order, 3 Dea. & Chit. 697, 703, 704.

by relation, from the date of the act of bankruptcy. But, as is usual in such cases, he must be charged interest from the date of the order of reference. It is well for *Jones* that the course has been adopted which these proceedings have taken, and that he himself has, as it were, proceeded for an account against himself; for if the accounts had been taken in adverse litigation, upon a bill in equity against him, he would have been far worse off.

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The Order was, that the Registrar's certificate should be confirmed,—that *Jones* should pay to *Harding* the costs occasioned him by his (*Jones's*) petition, to be taxed by the Registrar, the costs of *Harding* and of *Jones*, in respect of the reference, to be taxed as between solicitor and client. *Jones* to be at liberty to retain, out of the balance of 487*l.* 14*s.* in his hands, the balance of such costs, after setting off the former costs. *Jones* to pay the 487*l.* 14*s.*, and interest at 4*l.* per cent. from the 30th April 1834, down to the date of the order, and the like interest upon the residue of such balance, or upon the whole of the 487*l.* 14*s.* if, on setting off such costs as aforesaid, it should appear that there was no sum due to *Jones* for costs, to be computed from the date of the present order, till the time of payment. And if, on setting off and allowing to *Jones* the costs before directed to be paid by him to *Harding*, against the costs directed to be paid to *Jones*, it should appear that any sum is due from him, then *Jones* should pay such sum to *Harding*.

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Ex parte JOHN JOSIAH HOLFORD and JOHN BOWDEN, on behalf of themselves and CHARLES CAMPBELL, as surviving Assignees in trust of the Estate and Effects of FRANCIS ARMSTRONG and WILLIAM BECKETT, (both deceased,) under a Deed of Assignment, for the Benefit of their Creditors.—In the matter of ALEXANDER WOODWARD.

June 5.

Where, upon order of dividend, assignees for ward to creditor a bill for the amount of his dividend, but creditor rejects it, because he claims more than is offered (namely, full payment, without allowing the assignees a set-off, which they claimed against him, and the amount of which, together with the sum tendered, made up the amount of dividend declared on creditor's proof,) and the proceeds of the bill are received by one assignee, and by him invested at interest:—The creditor was held, after 20 years and upwards, entitled to the fund, and all interest made by it.

IN March 1811, the above petitioners, and *Campbell* and *Gonne*, (since deceased,) and the above *William Beckett*, presented a petition to the Chancellor, stating that the bankrupt, *Woodward*, being indebted to *Armstrong* and *Beckett*, in 1806, gave them a warrant of attorney to confess judgment for 6000*l.*, upon which, in the evening of the 15th or early in the morning of the 16th of May 1806, they issued execution, and the sheriff on the 16th took the bankrupt's effects and sold them for 1365*l.* 19*s.* 4*d.*, deducting expenses and poundage, which sum was paid over to *Armstrong* and *Beckett*. On the 21st of May a commission issued against *Woodward*, on the petition of Messrs. *Matthews*, *Greaves* being the solicitor, and it was worked at Liverpool. It was alleged that the act of bankruptcy took place on the very day on which the sheriff took the bankrupt's effects in execution, and the petitioners stated their belief, that such act of bankruptcy was concerted for the purpose of defeating the execution. *Woodward* was, however, adjudged bankrupt, and *Hudson*, *Sell* and *Knowles* were chosen assignees. *Armstrong* and *Beckett* becoming embarrassed, a trust-deed, dated 12th March 1817, was made between them and the above petitioners, and the other above-men-

tioned trustees, whereby all their property was assigned for the benefit of their creditors. The trustees, with the assistance of *Armstrong* and *Beckett*, made out an account current, and in that account of the bankrupt with *Armstrong* and *Beckett*, from the 12th October 1805 to the 20th May 1806, the day before the bankruptcy, including four bills of 200*l.*, 500*l.*, 500*l.* and 253*l.* 9*s.* 1*d.*, which, though not due at the date of the commission, had subsequently been taken up and paid by *A.* and *B.*, and the balance of that account was 9745*l.* 13*s.* 2*d.* due to *A.* and *B.*, which the trustees sought to prove, consenting to relinquish the 1365*l.* 19*s.* 4*d.* the amount of the levy, and also the claims they had on 100 pipes of port, provided the whole debt were admitted to be proved, objections having been made to the proof of the bills above-mentioned as having been paid after the bankruptcy. It was stated, that in the course of the interviews had on the subject with *Hudson*, and, as the petitioners supposed, with the assent and approbation of the other assignees, it was expressly understood and agreed, that the whole debt of 9745*l.* 13*s.* 2*d.* should be admitted to be proved, and upon that understanding the petitioners agreed not to contend for the validity of the execution, but to give up the 1365*l.* 19*s.* 4*d.* On the 12th of May 1808, a dividend was advertised, and then *Armstrong* and one of the trustees, *Campbell*, joined in an affidavit of debt, and applied to prove 9380*l.* 13*s.* 2*d.* the balance (supposing the above arrangement to be binding) of accounts with interest, after some deductions from the former statement of account not in any way affecting the points in question. Their agent, who tendered this proof, was also instructed to obtain payment of 101*l.* 15*s.*,

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which was supposed to be due to the petitioners, the trustees, from a party of the name of *Drew*, for wine sold to her by *A.* and *B.*, and of three other sums amounting to 147*l.* 14*s.* 3*d.*, supposed to be due to them from three other parties, for wines belonging to *A.* and *B.*, and sold on their account by the bankrupt to such three parties. But the agent found that the 101*l.* 15*s.* had been paid to the bankrupt by *A.* and *B.*'s desire, and that the other parties denied all liability to *A.* and *B.* The agent attended the meeting, and tendered proof for the 9380*l.* 13*s.* 2*d.*, and also for the two other sums of 101*l.* 15*s.* and 147*l.* 14*s.* 3*d.*, and this being objected to, as well as the proof for the 9380*l.* 13*s.* 2*d.*, notwithstanding the above-mentioned arrangement, and the agent not anticipating any objections to the proof in consequence of such arrangement,—the Commissioners admitted proof for 7183*l.* 2*s.* 11*d.* only, and permitted a claim to be entered for 2202*l.* 18*s.* 10*d.*, and ordered that 1526*l.* 6*s.* 1*d.* being composed of 1406*l.* 12*s.* 3*d.* the gross amount of the execution, *including* poundage and expenses, (the net proceeds of 1365*l.* 19*s.* 4*d.* only having been received by *A.* and *B.*) and 119*l.* 13*s.* 10*d.* interest thereon, should be refunded by them, or retained out of their dividend of 6*s.* 8*d.* in the pound, then declared. The proof stood thus:

Claimed.				£	s.	d.
Amount of bills paid by <i>A.</i> and <i>B.</i> after the						
bankruptcy.	..	..	..	1453	9	1
Part of 1109 <i>l.</i> 1 <i>s.</i> 2 <i>d.</i> objected to by assignees						
against claim of 9745 <i>l.</i> 13 <i>s.</i> 2 <i>d.</i> ..	..	..	..	500	0	0
<i>Drew's</i> debt.	..	..	..	101	15	0
Three other debts.	..	..	..	147	14	3
				2202	18	4
Admitted				£7183:2s. 11d.		

And from the dividend on the 7183*l.* 2*s.* 11*d.* was to be retained the 1526*l.* 6*s.* 1*d.*, the gross amount of levy and interest.

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The petitioners, however, declined to receive this dividend upon such terms, conceiving themselves aggrieved by the breach of the agreement entered into between them and *Hudson*, and declined to refund the amount of the levy, until their proof was properly adjusted. A bill of exchange for 868*l.* 1*s.* 6*d.* was remitted from Liverpool to *Hudson* in London, to be delivered to the petitioners, on their signing a receipt, acknowledging the receipt of 2394*l.* 7*s.* 7*d.*, as a dividend of 6*s.* 8*d.* in the pound on the sum of 7183*l.* 2*s.* 11*d.*, the 1526*l.* 6*s.* 1*d.* gross amount of levy, and interest, and the 868*l.* 1*s.* 6*d.* making up the amount 2394*l.* 7*s.* 7*d.* This bill, the petitioners, the trustees, refused to accept, and consequently *Hudson* received the amount of the bill, and retained the same, and since had accounted for the same to the estate of *Woodward*. Interest had arisen on this sum. That petition, after also showing the right of the petitioners to the sums entered as claims, prayed, that the petitioners therein might have liberty to go before the Commissioners and tender proof for such sums, and for payment of the dividend of 6*s.* 8*d.* on the whole debt proved and claimed, and in case interest had been made on the 868*l.* 1*s.* 6*d.* then that the petitioners might be declared entitled to be paid such interest in addition to their full dividend, and for liberty to inspect the proceedings, so as to elect whether the amount of the levy should be deducted from their dividends, or should be refunded by them.

The Lord Chancellor, on the 11th and 22d August 1811, made an order in favour of the petitioners' right

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to prove the 1453*l.* 9*s.* 1*d.* and 101*l.* 15*s.*, and to receive interest on the 868*l.* 1*s.* 6*d.*, his Lordship omitting to notice the other parts of the above prayer of the petition, as the petitioners understood; but it was found that the Secretary's minutes were so imperfect and unintelligible, that it was impossible to draw up the order.

The petition now before the Court went on to state: To avoid the expense of further petitioning, negotiations were then entered into between the parties, which continued down to the year 1821. On the 5th February in that year a meeting was called, and the trustees were admitted to prove in respect of the above-mentioned claims, 2136*l.* 4*s.* 5*d.*, being only 66*l.* 13*s.* 11*d.* less than the 2202*l.* 18*s.* 4*d.* originally claimed by them. But no dividend whatever had ever been paid to the trustees, either on the original proof in May 1808, or the subsequent one in February 1821.

The petitioners and co-trustees made several applications to the solicitor of the assignees to discover whether the 868*l.* 1*s.* 6*d.* was invested so as to produce interest, and in September 1811, they learnt, as a fact, that the money was invested in Exchequer bills, except a small portion of it, which *Hudson* retained to answer certain disbursements. It appeared, that the bill which was remitted to *Hudson* to pay the trustees the 868*l.* 1*s.* 6*d.*, was drawn by the bankers to the estate at Liverpool on *Masterman & Co.* in London, in favour of one of the assignees, who specially indorsed it payable to the order of the trustees; which indorsement, on the refusal of the trustees to accept the bill, was erased by *Hudson*, and *Hudson* and his bankers became indorsers of the bill, and several other facts were stated,

showing how the trustees traced the proceeds into their present investment, in the hands of the assignees, and to show that the identical 868*l.* 1*s.* 6*d.* had been appropriated by the assignees to the payment of the petitioners' and co-trustees' dividend, and had since made considerable interest. This petition, therefore, prayed an account, and for payment of all profits, interest, and accumulations made upon the sum of 868*l.* 1*s.* 6*d.* which had been appropriated to pay their dividend on the 7183*l.* 2*s.* 11*d.* originally proved by them.

It should be stated, that the receipt tendered for the signature of the trustees, when the 868*l.* 1*s.* 6*d.* was offered, was as follows :

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" Liverpool, June 6, 1806.

" Received from *T. Hudson*, (&c. assignees &c.) two thousand three hundred and ninety-four pounds seven shillings and 7*d.*, being first dividend ordered by the Commissioners of 6*s.* 8*d.* in the pound on 7183*l.* 2*s.* 11*d.* due to Messrs. *Armstrong* and *Beckett*, and received by us as trustees.

" N.B. This dividend was paid by the amount in their hands £1526 6 1
And one bill for 868 1 6

£2394 7 7"

Mr. Bethell and *Mr. Stevens*, after stating the facts of the petition, were stopped by the Court.

Mr. Swanston and *Mr. Purvis*, for the assignees, the respondents. Upwards of 20 years ago these petitioners repudiated the sum appropriated to pay their dividend, and now, at this date, they call upon us to pay them not only that sum, but all the interest that has arisen from the investment in the meantime. It may be asked at whose risk was the investment? assuredly not at the petitioners. It was at the peril of the assignees. It may be very true that the identical 868*l.* 1*s.* 6*d.* which

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which was invested, and upon which a profit has been made by that means, was that with which the assignees intended to pay the petitioners their dividend on the 7183*l*. But they refused to receive that sum at that time; and what is there that can now give them title to it identically, or to its profits? As well might it be said, that if an ordinary debtor tender a part of his debt to a creditor, which is refused, the creditor has afterwards a right to follow that particular money, and demand all the interest or profit made by it. As in that case, so here, at the moment the creditor declined to receive it, it reverted to its general position at least, and became part of the general assets of the bankrupt's estate. But we may go further in this case. When the proof was made, they were declared entitled to a dividend, but it is impossible to point out any precise moment when this 868*l*. was separated from the general corpus of the estate. It is very certain, that the order of dividend had not that effect. Neither, we contend, could the drawing of the bill, nor was it when it reached *Hudson's* hands, nor when, by erasure of the special indorsement, the amount of it was received by *Hudson*, and by him ultimately transferred into Court (a). Had the petitioners upon the tender repudiated it in a less general manner, they might have had some claim to it now, but it was rejected in the most general terms to this effect, "We, the petitioners, will not receive this money." [*Erskine*, C. J. The 868*l*. was separated by the special indorsement of the bill to the petitioners. That was a specific appropriation of the proceeds of that bill to pay them their dividend. At all events, the Order of Court had that effect, though

(a) This was done under Order of Court, on a petition to which the present petitioners were not parties.

no precise object of the payment into Court was specified.] We say, that the money was never at any moment separated from the bulk of the assets, and that even, if at that time it had been detached, when the petitioners rejected the bill, it reverted back again and was then mixed with the general funds in the assignees hands. [*Erskine*, C. J. Suppose several dividends had been declared, and the assignees had invested the several amounts at interest wholly unknown to the creditors, would not the creditors have a right to all the produce of the investment, so long as the monies remained ear-marked? It was so held in *Ex parte Renshaw, in the matter of Wild (a)*.] But where, as in the present case, the dividend had been absolutely repudiated, the rights of the creditors are materially different. [*Erskine*, C. J. Granting that, I do not think that the conduct of the petitioners amounted to an absolute repudiation. They merely say they will not receive the 868*l.* in full of their dividend, and not that they will not receive the 868*l.* because it did not belong to them.] [Sir *J. Cross*. You, the assignees, tender the 868*l.* clogged with a condition, to which the petitioners did not think it right to submit. They were, doubtless, ready to receive it unclogged with any such condition. Had you offered it "without prejudice," would they have rejected it?] From the correspondence of the parties, it does not appear that the rejection of the tender was founded on the terms of the receipt. It was rejected in general terms, and one very proper way of trying this question is, whether either an action of trover for the bill, or an action or suit of any kind, for the identical money,

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(a) 4 Deac. & Chit. 483.

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when invested, could have been maintained. We humbly submit that it could not; and that, therefore, the assignees are only liable to pay interest on this sum of money from the time its payment was *de facto* demanded by the petitioners, especially where the latter have lain by for so long a period of twenty-six years and upwards.

Mr. *Bethell* was not required by the Court to reply.

ERSKINE, C. J.—I am most decidedly of opinion in this case, that the petitioners are entitled to all the fruits of the money which was set apart to pay them, after the order of dividend was made. After the claim of the petitioners was considered and proof admitted, an order of dividend of 6s. 8d. in the pound was declared. On that, the assignees drew a bill, and forwarded it, through *Hudson*, to the petitioners, accompanied with a receipt for their signature, whereby, had they signed it, the petitioners would have precluded themselves from insisting on rights, to which it now appears they were entitled then to insist on. The bill was specially indorsed to the petitioners, and upon their refusing to receive it and sign the receipt, the special indorsement is erased by *Hudson*, and he received the money as separated from the corpus of the bankrupt's estate, and the proceeds are invested. The assignees petition against *Hudson* for an account of this money, showing that it was invested; to which petition the present petitioners were in nowise parties; but the Lord Chancellor directs an account to be taken as prayed, and orders the money, with its then produce, to be paid into Court, without declaring to whom the money belonged. It was accordingly paid in and invested, and so it has continued ever since, pro-

ducing interest. It cannot be looked upon otherwise than as the petitioners' money from the time of the order of dividend, and therefore the petitioners are entitled to all the profits that have been made by it.

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Sir J. CROSS.—The first question to be inquired of is, whether this money tendered in 1808, was ever separated from the bankrupt's estate? Of this I conceive there is no doubt. When the order of dividend is made, this particular fund is appropriated to the creditors who had proved. If the creditors who have proved omit to receive their dividends, and they remain unpaid, and the fund becomes invested by the assignees, those creditors are entitled to all accretions made by that fund, and the creditors at large have no interest in it. I admit that in general creditors are not entitled to interest on their dividends till payment is demanded from the assignees. That, however, only applies to the liability of the assignees. And where we find a fund had been set apart to answer particular dividends, and invested at interest, that fund specifically belongs to those particular creditors, and they are, as the owners of the fund, entitled to all produce made by it. Was the fund in question, when it was rejected by the petitioners, re-mixed with the bankrupt's estate? Looking at the facts, I have no hesitation in saying it was not, as it has remained ever since invested, and by itself, in different securities at interest. I therefore agree that the assignees are mere trustees of that specific fund, and that the petitioners are entitled to it and all the profits made by it.

Sir G. ROSE.—When the order of dividend is made, the amount is exclusively appropriated to those cre-

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ditors who have proved, and is thenceforth separated from the rest of the estate. In the case of *Grant v. Grant*, before the V. C. October 1828, (a note of which is handed to me by the registrar, Mr. *Barber*,) the Royal Exchange Assurance Company had entered a claim, and dividend was reserved; the assignee, *Campbell*, became bankrupt, and the Company sought to be recouped that dividend out of *Grant's* estate, but the V. C. was of opinion that the reserve being made for the benefit of the Company, *Grant's* estate should not suffer a further loss, they might prove against *Campbell's* estate (a). The assignees then draw a bill, which is forwarded to *Hudson*. The proceeds, we find, of that bill were ordered by the Court upon petition, with which these petitioners were not served, to be paid into Court and invested, which was done. The bill, when sent up, being rejected, gave, I admit, no property in the bill itself to the petitioners, they certainly could not have maintained trover for it. And when the assignees found that it was so rejected, they might have remitted it to the general estate, and would have been bound to pay interest on it only from the time of demand. But here it never was remitted, and the money, the amount of that bill, must be looked upon as set apart, especially from the mode of investment, for the use of the petitioners. I concede to the argument of the respondents, that if the funds had fallen the petitioners were not at the risk of the investment, and would not have suffered; but still they are entitled to every accretion made by the fund while invested. Whenever a creditor finds his money has been employed by his debtor, or is invested

(a) See a similar decision to this effect, cited in *Smith v. Duke of Chandos*, Barn. 419.

by him, the creditor has a right to adopt the investment, and call on his debtor to pay him the interest made. This is expressly laid down by Lord *Ellenborough* in *De Haviland v. Bowerbank (a)*. I am therefore of opinion that the prayer of this petition must be granted.

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Order as prayed, costs to be borne by each estate.

(a) 1 Campb. 50.

In the Matter of HYSLOP.

MR. STEVENS applied *ex parte* on behalf of the assignees, that the Court should sanction an arrangement (consented to by all creditors, but one, who was ready to submit to any order of the Court) entered into by the assignees, whereby they proposed to pay certain creditors 10s. in the pound, they claiming priority out of one estate, and then to consolidate the two estates, and to pay all other creditors rateably.

June 5.

Reference to registrar to see if arrangement out of Court by assignees was proper.

The COURT ordered a reference, to ascertain if such arrangement were beneficial.

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In the matter of WILLMAN.

June 6.

The fees payable under 1 & 2 W. 4, c. 56. ss. 45 & 46. to the secretary of bankrupts, not dispensed with where a country fiat was annulled because Commissioners declined to act, and a new fiat was proposed to be taken out in London in lieu of it. (a)

A Fiat issued in this matter, directed to Commissioners in the country, and was superseded because they declined to act; and it was proposed to issue a new fiat to a London Commissioner.

Mr. *Russell*, for the petitioning creditor, applied that it might be considered as a renewed fiat, or rather as "removed" under the 1 & 2 Will. 4. c. 56. s. 47. and that the 10*l.* and 20*l.* fees payable to the secretary of bankrupts, by the petitioning creditor and official assignees, when appointed under ss. 45 & 46, might be dispensed with. The necessity for the new fiat arose from no fault on the part of the petitioning creditor.

The COURT, however, thought that this would not fall under the 47th section, and therefore that they could not dispense with the payment of the regular fees (a).

(a) See *Ex parte Osborne, re Gunning*, ante, p. 398. S. C. 2 M. & A. 140.

Ex parte SMITH.—In the matter of SMITH.

June 16.

Leave to surrender after 42nd day, where bankrupt not guilty of any misconduct, always given with costs out of estate, though petition do not pray costs: joint fiat having subsequently issued, *quære*, which estate should bear costs, reserved.

THIS was a petition by the bankrupt for leave to surrender, but it omitted to pray costs.

Mr. *Smythe*, for the petitioner. The petitioner has been guilty of no wilful contempt or misconduct in this case. He was abroad *bonâ fide* when the first fiat issued, and therefore did not know of its existence till

quære, which estate should bear costs, reserved.

after the time for surrendering had expired. As soon as he comes to England, he is anxious to be permitted to conform himself by surrender. Under these circumstances, the Court will permit his surrender, and allow him costs out of his estate. But a joint fiat having since issued, the question is, out of which estate, joint or separate, such costs are to come.

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Mr. *K. Parker*, *contra*. There are no costs prayed, and another difficulty is, that if the separate fiat is superseded, we, the assignees under it, cannot have costs out of the joint estate.

Sir G. ROSE.—The omission to pray costs goes for nothing in such a case as this. Costs are always allowed to a bankrupt coming in and petitioning for leave to surrender, where he has been guilty of no default in not surrendering before the 42nd day had expired. Such surrender is for the benefit of his estate, and therefore costs are always given. The joint estate will, in all probability, have to pay those costs, as it was subsequent to the separate fiat, which is never superseded but on such terms as the Court imposes.

Leave to surrender; but the question, which estate should pay the costs, was reserved.



Ex parte JOHN MULLINS SANDHAM, Clerk in the War Office, and duly authorized by Warrant from the Commissioners of the Treasury on their Behalf.—In the matter of ALEXANDER ROSS (formerly GRAY) and JOHN OGHLVIE.

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June 16.

In 1780 *A. & B.* were partners as army agents, having been in the habit of receiving money from the government for the pay of certain regiments.

THIS was a petition on behalf of his Majesty's Government, seeking to prove a debt of 91,879*l.* against the estate of *Alexander Ross* and *John Ogilvie*. In 1772, *George Ross* and the bankrupt, *Alexander Ross*, (then *Alexander Gray*, he having subsequently changed his

In that year *A.* retires, and *B. & C.* carry on the business as before, but without coming to any account with the Crown, and without any account whatever being taken of the liabilities of the firm of *A. & B.* at the time of *A.*'s retiring. In 1783, *B. & C.* are required by the government to render the account of monies issued for the several regiments during the period of the existence of the firm of *A. & B.* and of *B. & C.*, which they do without any break appearing in them at 1780, when *A.* retired. But the accounts rendered do not state any debtor and creditor account as between the respective firms and the Crown, but show simply the sums issued in respect of each regiment, and how they have been applied. On the formation of the firm of *B. & C.*, the old ledgers are used; there was no agreement to take to the liabilities of *A. & B.*, and every thing is carried on in the same manner as before till 1783, when the 23 *Geo. 3*, c. 30, was passed, which directs that an estimate is to be thenceforth prepared of the amount which will be required for the purposes of the army; that the amount is to be paid from time to time into the bank; that the paymaster of the forces is to communicate to the Secretary at War the sums that will be required for the purposes of the different regiments; that the agents of the different regiments are to communicate to the Secretary at War the sums that will be required for the different regiments, and an issue is then made to the agent for the particular purposes of those regiments, and annual accounts were required to be rendered by the several agents. Upon this footing matters are carried on till 1804, when *B. & C.* became bankrupts, and a balance of 150,000*l.* is found due to the Crown; and in 1820, and not before, it is found that 91,000*l.*, part of the 150,000*l.*, was due at the time of the retirement of *A.*

Seemle, under these circumstances, that *B. & C.* could not be presumed to have adopted the debt of *A. & B.*, and that the government could not be presumed to have assented thereto had such adoption existed; and, consequently, that the government had no right to prove the entire sum of 150,000*l.* against *B. & C.*'s estate. (*Cross, J., dissent.*)

But it also appearing that the assignees had, by proceedings in the Court of Session in Scotland, treated the 91,000*l.* as due from their estate, and the government having, on the other hand, sued the representatives of *A.* in Scotland (subsequently to the discovery of the balance being due) so as to charge *A.* alone as the debtor, a claim was permitted to be entered till the result of the Crown's proceedings, which were still pending, against the representatives of *A.* was ascertained.

Clayton's Case discussed.

Note.—Although this case partakes more of a question of fact than of law; and although no distinct determination was come to, yet, as there is so much learning in it upon the subject of adoption of a new debtor in lieu of an old one, it has been deemed advisable to report it.—*E. C.*

name, *Gray*, to that of *Ross*,) carried on partnership as army agents, under the name of *Ross* and *Gray*, receiving from the government various large sums of money to the use of several regiments, to which they were agents, until 1780, when *G. Ross* retired, and *A. Ross* (then *Gray*) took *Ogilvie* into partnership. In 1796, *Ross* and *Ogilvie* took *Willett* into partnership, which firm continued under the name of *Ross*, *Ogilvie* and *Willett*, until 1803, when *Willett* died, and the firm of *Ross* and *Ogilvie* continued the business until 1804, when they became bankrupt. It was long subsequently discovered, that when the original firm of *G. Ross* and *Gray* terminated, a debt was due to the Crown from them, at that time, of 91,879*l*. It appeared that the government every month made payments to the agents of regiments on their account, and that running accounts were kept by such agents between themselves and the government, and between themselves and the regiments. The above petitioner, in 1833, presented a petition to this Court, stating that Mr. Commissioner *Holroyd* had disallowed the proof, and praying a declaration, that he was, on behalf of the Crown, entitled to prove the debt of 91,879*l*. against the above bankrupts, contending that the debt was transferred from firm to firm, so as to render the bankrupts liable under the circumstances detailed in the Registrar's report, hereafter mentioned. On the 5th July 1833, it was referred to Mr. *Gregg*, Deputy Registrar, to inquire and certify whether, at the time of the formation of the partnership of *Gray*, afterwards *Ross* and *Ogilvie*, the sum of 91,879*l*. was transferred to the debit of that firm; and if so, in what manner transferred, and with liberty to state special cir-

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cumstances, and also to inquire and state whether, at the time *Willett* became a partner in the firm of *Ross* and *Ogilvie*, the 91,879*l.* was transferred to the debit of the copartnership of *Ross*, *Ogilvie* and *Willett*, and if so, in what manner, and with liberty to state special circumstances. And also to inquire and state whether, at the time of the death of *Willett* (about 12th October 1808) the 91,879*l.* was transferred to the debit of the continuing firm of *Ross* and *Ogilvie*, and in what manner, with like liberty to state special circumstances.

In pursuance of this order, the Registrar made his report, dated 24th February 1835, and the report contained all the facts material to be stated. The Registrar certified, that neither at the formation of the partnership of *Ross* and *Ogilvie*, nor at the formation of the partnership of *Ross*, *Ogilvie* and *Willett*, nor at the decease of *Willett*, and consequent continuance of the firm of *Ross* and *Ogilvie*, was any transfer made of the 91,879*l.* to the debit of either of the firms. But the master found specially, that *G. Ross* and *Alexander* (then) *Gray*, first became partners, as army agents, under the firm of *Ross* and *Gray*, on the 24th January 1772, and continued to carry on such business in copartnership together under three several agreements or articles of copartnership, bearing date respectively the 7th January 1772, the 7th January 1775, and the 7th May 1777, until the month of August 1780, when the partnership ceased as from the 24th June 1780. That *G. Ross* then retired, and *Alexander* (then) *Gray* took *Ogilvie* into partnership with him, and they carried on business in copartnership down to 1786, under the firm of *Gray* and *Ogilvie*, in which year *G. Ross* died, and *Alexander* (then) *Gray* then assumed the name of *Ross*; he and

Ogilvie thenceforth carrying on the business, under the name of *Ross* and *Ogilvie*, down to the year 1796. They then took *Willett* into the firm for seven years, from the 24th December 1796; *Willett* died in October 1803, and *Ross* and *Ogilvie* continued the business in their two names till their bankruptcy in May 1804. That on the retirement of *G. Ross* in 1780, *Ross* (then *Gray*) and *Ogilvie* succeeded to the agency of almost all the regiments to which the firm of *Ross* and *Gray* had been agents; and that in all cases in which they so succeeded, new letters of attorney were executed by the colonels of such regiments to *Gray* and *Ogilvie*. That the articles of partnership between (then) *Gray* and *Ogilvie* did not contain any covenant, or the like, by which they were to adopt, or did adopt, the debts or credits of the prior firm of *Ross* and *Gray*; and it did not appear that (then) *Gray* and *Ogilvie* ever entered into any contract or agreement with the prior firm of *Ross* and *Gray*, or with *Ross* individually, or with the government, or the War Office, or Secretary at War, or with the colonels of the several regiments, or with any other person or persons, whereby they contracted or agreed to adopt the debt or debts of *Ross* and *Gray*, or become in any manner responsible for the same, or any part thereof. That the firm of *A. Ross* and *Ogilvie* succeeded the firm of *Ross* and (then) *Gray* in their agency to the several regiments of the 1st, 7th, 13th, 14th, 15th, 21st, 35th, 49th, 53rd, 54th, 59th, 60th, 71st, 74th, 80th, 81st, 87th, 92nd, and 94th of foot, the Loyal Irish Fencibles, the West Fencibles, the Coldstream Guards, the 11th Dragoons, and certain garrisons. That on the retirement of *G. Ross* in 1780, there was due to the government, from the firm of *Ross* and *Gray*, the sum of 91,879*l.*, but

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that neither upon such retirement, or on the formation of the new firm of *Ross* and *Ogilvie*, did any settlement or adjustment of the accounts of *Ross* and *Gray* take place. And it was not then known whether they were indebted to the government or the government to them; and that no adjustment or settlement of the accounts of the said firm of *Ross* and *Gray*, so as to show the amount at that time due by them to the government, took place until some time after the bankruptcy of *Gray* and *Ogilvie*; when it was for the first time discovered that the sum of 91,879*l.* was so due. That the firm of *Ross* and *Gray*, at the time of the retirement of *G. Ross*, had the agency of certain regiments, which never came to the firm of *Ross* and *Ogilvie*, and was then and still indebted to the government, in respect of such agency, in the sum of 2023*l.* over and above the 91,879*l.* That the firm of *Gray*, or *Ross* and *Ogilvie*, became possessed of the books of the prior firm of *Ross* and *Gray*, and continued their accounts therein, as to all regiments to which they became agents, from August 1780, when the new firm commenced, till December 1780, when new ledgers were opened for sixteen different regiments; and the balances from the old books were brought forward into the new ledger, and accounts opened therein (at what date did not appear) for the firm of *Ross* and *Gray*, as at the 25th December 1780, but that there was no agreement between the said firms for any such transfer. And that there was no assent of the government, or of the respective colonels of the said regiments, to forego their demands against the said firm of *Ross* and *Gray*, and to receive the said firm of *Gray* and *Ogilvie* as their debtors, in lieu and in discharge of the said firm of *Ross* and *Gray*, “ unless (as the report expressly stated) such

agreement or assent was to be inferred from the circumstances therein set forth."

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The report continued to state, that *A. Gray* (afterwards *Ross*) and *John Ogilvie* were the English executors named in the will of *G. Ross*, and on the 20th April 1786, they proved his will in the Prerogative Court of Canterbury. That previous to 1783, the agents of all infantry regiments kept and rendered to the War Office, accounts called "the non-effective," "poundage," "vacant pay," and "stoppage" accounts of each regiment; the first of which accounts was made up to the 24th June in each year, and the balance carried forward to the succeeding year; and the others were continued without any annual break, but none of them were annually rendered to the War Office. That in 1783, the stat. 23 *Geo. 3. c. 50.* passed, which required annual accounts to be rendered by agents. And from the 25th December 1783, an entire change was made in the mode of keeping and rendering the accounts, and the above-mentioned divisions of them were abolished. That a committee for examining the army accounts from 1775 to 1783, was afterwards appointed; and on the 14th November 1786, a circular letter was written from the Secretary at War to the agents for the several regiments in the King's service, as follows:—

"War Office, 14 November 1786.

"Sir,—I am to acquaint you that a committee is appointed for the purpose of examining the (above-mentioned) accounts of the regular corps of foot, from the 25th June 1775, to 24th December 1783, or the respective term of disbandment, and the stock-purse and vacant pay accounts of corps of Dragoon Guards and

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Dragoons, from the 25th June 1777 to the same period. The members of this committee are" &c. &c. "You are to attend to produce your vouchers, and give every necessary information when called upon by a requisition from their board. Such accounts, under the description above stated, as have not yet been transmitted to any office in pursuance of the directions already given, are to be delivered into the said committee without delay.

(Signed.) *George Yonge.*

"Messrs. *Ross and Ogilvie.*"

That in obedience to these directions, *Ross and Ogilvie* rendered to the committee the accounts of the several regiments in the agency of *Ross and Gray*, for the period from June 1775 to December 1783, *continuing them without any rest or break at June 1780*. That they rendered the accounts of the 1st battalion 1st regiment of foot, from 25 June 1775 to 24 June 1782. In the non-effective account at the end of each year, up to 24 June 1780, the signature was *Ross and Gray*, and from that period to the end, *Ross and Ogilvie*; but the balance was carried forward and continued from year to year, throughout the whole account. The vacant pay account was for the whole period up to June 1782, without any rest or break or division at any part of the period, and was signed *Ross and Gray*. The poundage account was rendered in the same way, and was signed *Ross and Ogilvie*, and so was the stoppage account. Upon examination of these accounts and inspection of the agents' books, after the bankruptcy of *Ross and Ogilvie*, it appeared that 1413*l.* odd was due from the agents at 24 June 1780.

[The report then went through, in like manner, the

accounts of the several regiments in the agency of *Ross and Gray*, and subsequently of *Ross and Ogilvie*, showing how each was signed, and, as in the instance above set forth, that sometimes a break was made, and sometimes not, and that the signature was sometimes *Ross and Gray*, sometimes *Ross and Ogilvie*, and also sometimes *A. Ross*, and also sometimes *Ross and Ogilvie* for *Ross and Gray*; and that the balances were always carried forward to 1782; and also showing what the balance due to the Crown in 1780, on account of each regiment, had been found to be.] The report, however, found, that with respect to the 2d foot or Coldstream Guards, on the 5th April 1826, *the assignees of Ross and Ogilvie were required*, by a letter from the War Office, to transmit a statement of the sums remaining in the agents' hands, on account of certain services therein specified in the accounts of this regiment, for the period from 25 June 1775 to 23 November 1784. To which the agent for the assignees made a return, showing that 2270*l.* remained due from the agents for those services from the above period, but stating claims on the other hand, which were allowed by the War Office, amounting to 408*l.*, leaving the balance due 1861*l.*, but at the same time stating that this sum 568*l.* was due for the period prior to 25 June 1780, which was, on a subsequent statement made by him, increased to 773*l.* That with respect to the 11th Dragoons, *Ross and Ogilvie* rendered the stock-purse and vacant pay accounts from 25 June 1777 to 24 December 1780; the stock purse account was made up to 24 June in each year, and the balance regularly carried forward. The account was signed at the end *Ross and Gray*. The balance of the account so rendered was 338*l.* due

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to the agent, which was credited in the account as received from Messrs. *Gray* and *Collyer* (the succeeding agents). The vacant pay account was for the whole period, down to 1780, signed *Ross* and *Gray*, (and so forth). On the 8th June 1826, the assignees were required to render a statement of monies remaining in the hands of *Ross* and *Ogilvie*, as agents for certain regiments in the requisition specified, and also for other services. In answer to which, on the 28th July 1826, the agent for the assignees transmitted an account of unpaid balances on account of garrisons in the agency of *Ross* and *Ogilvie*, in which was included the sum of 114*l.* due prior to June 1780, transferred from the books of *G. Ross* to the ledgers of *Ross* and *Ogilvie*; but stating, that as no settlement had taken place between *G. Ross's* estate and *Ross* and *Ogilvie*, the same could not be admitted against the bankrupts. That all the accounts delivered by *Ross* and *Ogilvie*, to the government, were made out in the following manner. "Drs. Account vacant pay of commissioned officers of his majesty's (&c.) regiment, from 25 June 1775 to 24 June 1782. Crs." "Drs. Non-effective account from &c. to &c. Crs."

That the committee from time to time reported to the Secretary at War, on each of the accounts so rendered to them, stating that they had received them from *Ross* and *Ogilvie*, the agents for such regiments (except those which were signed *A. Ross*, or *Ross* and *Gray*, and which they reported as *A. Ross's* and *Ross* and *Gray's* accounts respectively), and specifying the balances then due; and in consequence of such reports the Secretary at War called on *Ross* and *Ogilvie* to pay

the balances into the Exchequer, (which requisition was not, however, enforced,) as in the instance of the 15th regiment of foot, which was as follows :—

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“ Office for Army Accounts, 20 August 1792.

“ Sir,—Having received from Messrs. *Ross* and *Ogilvie*, agents for the 15th regiment of foot, the non-effective poundage, stoppage, and vacant pay accounts, from 25 December 1778 to 24 December 1783, we proceeded to examine the same, and now do ourselves the honour to transmit to you the said accounts, with our statement thereof, and a list of articles we have disallowed, with our reasons for the same, and a reference by number to the corresponding articles in the agents' accounts. [Here followed such accounts, finding a balance due on account of this regiment, from 25 December 1778 to 24 December 1783, 7305*l*.]

(Signed.) *Richard Taylor, Joseph Alcock.*

“ To the Right Hon. Sir *G. Yonge*, K. B. &c. &c.”

That on the 28th November 1792, the Secretary at War wrote to *Ross* and *Ogilvie*, stating, that the accounts had been examined, setting forth the accounts, and requiring payment of the balance 4880*l*. into the Exchequer. That after the bankruptcy of *Ross* and *Ogilvie*, in the year 1804, the Scotch executors instituted a suit in the Scotch Courts against the executors in England, for a sum said to be due from them to *G. Ross's* estate, and obtained a decree. That the assignees, in 1806, instituted an action of reduction, to set aside the decree, in which they claimed a very large balance as due to the bankrupts upon the whole account, on the ground as stated in their condescendence in that suit,

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“that their intermissions with *G. Ross*’s estate were greatly overbalanced by the debt and obligation of *G. Ross*, which had been satisfied of and by *Ross* and *Ogilvie*, and that as *Ross* and *Ogilvie*, on succeeding to the business of the said *G. Ross*, took upon them all the debts due by him to the different regiments for which he was agent, they carried on the business in the very same manner and with the same books, and also that *Ross* and *Ogilvie*, on taking the management of the business, instead of getting a final clearance with *G. Ross*, and beginning on an entirely new footing, came, in fact, entirely into his place, took upon them all his obligations, and carried on the business with no other change than the substitution of their names for his, and that they, therefore, continued the business with the same books and in the same train on which it had formerly been carried on, and that his regimental debts were in the different regiments debited as their own.”

That in 1820 the assignees applied to the Secretary at War to furnish them with an official statement of the balance due to the Crown from *Ross* and *Gray*, at June 1780, in support of their suit. That in reply, dated 7 November 1820, Lord *Palmerston*, then Secretary at War, stated that a similar application had been made more than once to his department, particularly in 1817, but that after every possible attempt to separate the balances of *G. Ross* up to 24 June 1780, from those of *Ross* and *Ogilvie* subsequent to that date, it was found to be wholly impracticable. That at the renewed instance of the surviving assignee, a separation was at last arrived at, and the aforesaid sum of 91,879*l.* appeared to be due to the Crown from *Ross* and *Gray* at June 1781, in respect of the regiments of which *Gray* and *Ogilvie* afterwards became agents.

That when *Ross* and *Ogilvie* took *Willett* into partnership, articles were entered into, by which, in consideration of 20,000*l.* by him agreed to be brought into the firm, they agreed to admit him as partner, but no responsibility was to attach to him for or in respect of any of the agency dealings prior to December 1796; and that on the formation of the new firm of *Ross* and *Ogilvie* and *Willett*, the accounts of all the regiments which were then in the agency of the firm of *Ross* and *Ogilvie*, were continued in the books of *Ross* and *Ogilvie* in the same way as before *Willett's* joining them, and that no settlement of the accounts of the firm of *Ross* and *Gray*, or *Gray* and *Ogilvie*, then or ever took place until after the bankruptcy. That after *Willett's* death all the accounts were entered in the same books as before, without any settlement of accounts. That in 1832, the Lords of the Treasury and Lord Advocate of Scotland, commenced a suit in the Court of Great Sessions in Scotland, for the purpose (among other things) of obtaining payment from the heirs &c. of *G. Ross* of the 91,879*l.* with interest from June 1780.

That subsequently to the letter of 14 November 1786, *Alexander Ross* (then *Gray*) received a letter, dated 18 November 1786, from the War Office, requiring him to transmit "a state of whatever balances may be remaining in your hands of public monies on account of regiments of foot, accruing between the period of the last settlement of 25 June 1775, and an account of regiments of cavalry between the period of the last settlement and 25 June 1777. The balances of stock purse and non-effective accounts are not to be understood as included in this requisition, excepting those of regiments which may have been transferred

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from the British to the Irish establishment, the rest being, in pursuance of the regulations then subsisting, carried forward to subsequent years, which fall under the inspection of the committee for army accounts." Signed *George Yonge*, and addressed "*A. Ross*, for self and the late *G. Ross*."

The report then set forth other letters, one by *G. Ross* after his retirement, and others from *Ross* and *Ogilvie* since the bankruptcy, tending, if any thing, to show that *G. Ross*, and not *Ross* and *Ogilvie*, remained indebted to the public; and others, also after the bankruptcy, from the Secretary at War, charging that *Ross* and *Ogilvie* were such debtors. Upon these special facts so found by the Registrar's report, the petitioner sought to recover.

Mr. *Wightman*, for the petitioners. The case which I have to support on the part of the Crown is, that although the Registrar has found by his report, that there is no direct transfer of the debt, yet, looking at the special circumstances, such transfer is to be inferred. Throughout there has been one running account, and the parties continued to receive and pay money, just as if there had been no change of the individual members of the firm. There is no doubt that they did not enter into a direct contract to transfer the debt on the one hand, or to adopt the new firm as debtors on the other; but circumstances went on as before the change of the firm took place; just as in the ordinary case where there is a change of partners in a banking firm. The terms upon which they dealt is to be judged of by the course of dealing, and by that only. The report finds, that no balance was struck between *Ross* and *Gray* and

Gray and Ogilvie. This case would assume a very different complexion, if, at the time *G. Ross* retired in 1780, there had been a precise balance struck, and it had been ascertained that the old firm was indebted to the Crown in the sum of 91,879*l*. Then it might be said, here was a line drawn, and unless you can show that the new firm adopted that balance, it could not be contended they ought to be charged with it. But there is no balance found until the accounts are long after taken, and then the parties strike different balances at different times, and see how much was due at one time and how much at another, but there had been no balance struck before. It was a running account unascertained, and it does not appear that any general account was ever rendered. Payments had been made on the one side and on the other, and so the dealing continued until the bankruptcy. I submit, although there was no direct assent on the part of the bankrupts, such assent is to be assumed from the continuance of the dealing. Who ever went to a banker when a new partner was introduced, and said, "I must have a new assent to my old balance?" In practice, it is universal to go on with a running account and take no notice of the introduction of new partners, and then I say it follows, that that which is a running account, so continues.

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Sir G. ROSE.—It appears to me, that the question upon this petition is brought to a very short one. The actual transfer is found by the Registrar not to have taken place; that goes but a very little way to decide the question, whether the mode of dealing between the parties entitled you to say it was so transferred. The report goes a certain way to show that that mode of

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dealing was adopted by the continuing partners, because he finds that the assignees instituted an action of reduction against the executors of *Ross*, and in that suit of reduction they allege, that *Ross* and *Ogilvie*, upon succeeding to the business of *Ross*, took upon them all the debts due from *Ross* at the time he was a member of that partnership. That to a certain extent would entitle you to say that they had adopted the debt. But the difficulty is this, you must find assent to that contract before the bankruptcy. Then it appears upon the finding, that as late as 1832 you instituted a suit in Scotland against the heirs and executors of *Ross*, and claimed this as an existing debt from them. That is what they say, that without any contract at that time you were contending for a special liability. The first thing will be to ascertain the state of that suit in Scotland before we stir a step. One is a tender, on their part, of a contract and an adoption of it, and the other is a repudiation of it.

Mr. *Wightman*. The circumstance of the assignees having instituted a suit in Scotland for a portion of the sum, is evidence against them to the whole extent of my argument, that there was a tacit assignment. How can they draw a line and say they adopted it only to a particular point and no further? If they adopted it at all, it was because nothing was said upon the subject. Then the course of dealing has shown it was a running account; that the new concern took the engagements of the old, and carried on the concern as they found it, exactly in the same mode. [Sir *G. Rose*. Much less than the Master has stated, will make it an adoption by them, if there is not a repudiation by you.] We might

find ourselves in a position of great difficulty, if we were to be stopped from our proof against the estate here, because we have instituted a suit in Scotland against the representatives of *Ross*. We may wholly have mistaken our rights. How often does it happen, both in Courts of Law and Equity, that parties find they have brought their action or instituted proceedings against the wrong person, but they are not concluded by it, otherwise, in our case, this manifest injustice would occur: when we went back to the Court in Scotland, they might say, "Your conduct is explained by your proceeding in the Court of Review. You have, by what you have done there, absolved the estate of *G. Ross*, and treated this as a running account. You made your application to that Court, founded on the sole ground, that down to the time of the bankruptcy it was a running account, and now you come and say, let us be paid out of *G. Ross's* estate." Thus, between the two tribunals, we should lose our remedy altogether. If our course of proceeding in Scotland affords any argument against us here, the assignees, by their proceedings before the same tribunal, have in the same degree prejudiced their case against our claim here. But I do not propose that the parties, against whom we are now applying, should be in any way judged by their conduct ulterior to the bankruptcy. Their subsequent conduct is no evidence of the course of dealing. We should look no later than 1804 to judge of that. Where a person has brought his action against a wrong party, and failed in consequence, I will venture to say it has never been urged as evidence against him on the trial of his subsequent action against the right individual, that his prior action was evidence of his having no claim in the second action. This

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Court is bound to decide upon the rights which we establish in this particular case, and ought not to be influenced by any mistaken notion we may have entertained of our rights on a prior occasion.

Sir J. Cross.—Was this money ever noticed at all? Can you point out any entry in the accounts to show that that amount, or any integral part of it, was ever adopted by the bankrupts, or in any way mixed up either in the annual accounts which were rendered after 1783, or in any other? Because, otherwise, one is at a loss to understand how the succeeding partners of *Ross* and *Gray* could derive any beneficial interest whatever from that debt. If it was never noticed, it would seem that no compensation was made for the adoption of so enormous a debt as 91,879*l.*, and to satisfy us of that adoption would require strong evidence.

Mr. *Wightman*. The general accounts of all the regiments were set forth. These accounts were of a complicated nature, and therefore each regiment's separate account were returned to the War Office. The portion of each regiment appeared in the regiment's account; but there was no specific sum of 91,879*l.* ever appearing, for that is the aggregate of all the accounts. The accounts of each regiment, when taken together, embodied all that remained due. The accounts were rendered by *Ross* and *Ogilvie* with reference to each regiment separately; and they, in the account belonging to that regiment, included the amount due from all time past. So that, in the year 1783, when they rendered an account of the 15th regiment of foot (for instance), and make the balance due 7305*l.* in respect of that regiment; that 7305*l.*, or a portion of it, formed part of the 91,879*l.*

Suppose it had happened, that instead of 91,879*l.*, which is the aggregate account of a great many regiments, the dealings had only reference to the 15th regiment, and that at the time of the dissolution in 1780 there had been just 2000*l.* due from *Ross* to the government on account of that regiment; then in the subsequent accounts rendered by the succeeding firms, that sum would be increased till the whole might be 7305*l.*; but that sum would be partly composed of the 2000*l.* due from *Ross*. Thus the 91,879*l.* is collected in fragments from the accounts of each separate regiment, and in 1804 there was due, we say, to the government generally, from *Ross* and *Ogilvie*, 154,000*l.*; but, on drawing lines, it is found that the sum due, at the time when *Ross* retired from the concern, was 91,879*l.* It is analogous to this: Suppose a banker takes in a new partner, and at that time owes his customer 5000*l.*, and there is a succession of partnerships, and ultimately the creditor finds his balance amounts to 20,000*l.*, an accountant would say, that "at the time the new partner came in there was 5000*l.* due, there has been a running account going on, and that sum has been wiped off by successive payments, but the balance is ultimately 20,000*l.* due to the customer. If we look at the amounts, and stop and draw balances, we shall see that such and such sums were due at certain times." Now the course of dealing is this:—The agent is the intermediate party between the Treasury and the regiments. The agents receive from the Treasury the money that is to be delivered out in detail to the respective regiments, and all the money that the agents ought to receive, is money to pay the expenses of the respective regiments, and is received by them upon the credit of those regiments. Here, the deficiency has always been covered by a running account. Though there may have been a

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deficiency of this 91,879*l.*, millions were paid to these agents subsequently. We find, that in the year 1804 there is 154,000*l.* owing to the government, but in the meantime there are payments to a large amount in respect of thirty regiments for twenty-four years ; so that the receipts of the agent were continual, and the balance ran on from year to year. No doubt in one year the amount paid to such regiment might be above 100,000*l.*; still the ultimate balance, when the bankruptcy took place, was 154,000*l.* The way they calculated it was, that as a gross sum was paid into their hands, they paid out such demands as were made upon them in respect of those regiments whose money they received. Then if some of the regiments did not draw for their money, they applied that money in their business ; and then, as they received fresh payments for subsequent years, they applied that money to bygone years, as demands came upon them. They may, in every respect, be considered as analogous to bankers ; for they receive the money from the government, and the regiments are paid through the medium of these agents. The Treasury give the money to the agents, and the colonels of the regiments draw it out. It is a floating amount of cash paid to them by the Treasury at many periods. During this time the balance may have sometimes been much less ; I admit that the payments were made specifically for specific regiments, and for specific years, but there is always a difference in the fluctuating balance which they have in their hands, and therefore (and indeed that is the ground of the argument) it is a balance formed at the end of a long running account between the agent and the government. There has been no time before the bankruptcy when that account was ever settled and

adjusted; and afterwards, when it turns out there is a deficiency upon the whole of 154,000*l.*, the accountant looks at various periods and says, "I will see how much is deficient at a particular time." But that is not to be considered as a deficiency that is to remain during all the subsequent period. It is reduced by subsequent payments, because though, at the time of *G. Ross's* secession, the accountant finds there was 91,879*l.* due to the government, it may be that, ten years afterwards, there was more or less than that sum due; or it might be, that the balance was the other way. It is only in taking the aggregate amount of the running account at the end, that we find there is a deficiency of 154,000*l.*

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Sir G. ROSE.—It struck me, that all we had to do was, to arrive at the conclusion of fact; for I apprehend the law to be quite settled. Then, as to the fact, I apprehend the mode adopted would be this. These agents are; from time to time, in the habit of receiving money from the government to pay the expenses of particular regiments; and if *Ross's* debt continued down to the time of the bankruptcy, the amount of it was 91,000*l.* The proposition might be, that this money was intrusted in the hands of *Ross* and *Ogilvie* as an accountable fund for these particular regiments; but I believe it has been decided that the Crown has the right to call for an account at the time of the bankruptcy. That being the state of things, there is found to be 91,000*l.*, the amount of *Ross's* debt, continued down to the time of the bankruptcy. If nothing more had been done, the debt would still have remained a debt due from *Ross*, but it would be quite competent for the continuing partners to adopt that debt; and then it would be their debt, provided the

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creditor chose to assume the new partners as his debtors. In all these cases, it is a question of fact whether, when the new firm adopts the old debt, there has been acquiescence of the creditors, more or less. The question was one which occurred to myself, how far the Crown is bound by any question with regard to the bankruptcy, and whether it may not be competent to declare its assent to the arrangement. That is open to you to discuss, supposing you do not make out the case that you did accede to the contract before the bankruptcy. The way in which the point stands is this :—There is evidence furnished by the assignees that they did adopt that debt, which was the debt of *Ross*. The evidence may or may not be sufficient to show that the Crown acceded to that adoption. The circumstance of the suit filed by the Crown against the heirs of *Ross*, tends, in a certain degree, to show that the Crown had not released *Ross* and adopted the new firm. It is well settled that in the case of a deceased partner in a firm, or in the case of a partner retired from a firm, the payment of money from time to time by the new firm will not discharge the liability of the old partner. The simple question, therefore, before us is nothing more or less than a question of fact.—Did the Crown, before the bankruptcy, accede to an arrangement by which they were to adopt the new firm as their debtors? If there is no satisfactory evidence that the Crown did accede to that arrangement, then is the Crown bound by the rule in bankruptcy, which requires that there should be access before the bankruptcy; and then, how far what has taken place since the bankruptcy amounts to anything more than an attempt to make available funds, of which, if they succeed, the assignees would have the benefit.

Mr. *Wightman*. That is precisely the argument I should adopt, and I submit that the crown is not bound. [*Erskine*, C. J. But you come here by virtue of a supposed contract, and you must show what that supposed contract was.] Having come here, we must come in *pari passu* with the rest of the creditors.

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There is a class of cases in which it is decided, that where, in a banking account, a new partner is taken in, and an old one dies, and the account is continued, the transactions of the old and new firm being blended without any settlement, it is to be presumed and considered as one entire account; you may then infer a contract where a continuing account is treated as one entire account between all parties, as is the case here. That rule has been laid down in *Clayton's case* (a), and in *Cook v. Enderby* (b) the same principle is recognized. Here it has been treated as one entire account, and the ordinary rule of appropriation of payments, which is the foundation of a particular class of cases, does not apply. In the case of a banking account, there is not room for any other appropriation than that which arises from the order in which the receipts and payments take place. Presumably, it is the first sum paid in which is the first drawn out, and upon that principle all accounts, and particularly all such accounts, are settled. Therefore, in the case of a running account, all the old items on the debit side are wiped out by the items on the credit side, and we must look to the sum remaining at the end: it not being sufficient for an accountant to say in this case, I will look at the accounts, and tell you how much was due at the time of *Ross's* secession, and treat

(a) 1 Mer. 572.

(b) 2 Brod. & B. 70.

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 Ex parte you have on both sides agreed to identify this balance,
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 tional identity : we have not fallen back on the old
 balance. They apply to us to know how much was
 due at certain periods, and we gave them that informa-
 tion. Surely this amounts to nothing ; it is merely as
 though the Court were to ask me the simple question,
 how much was due at such and such a time. [*Erskine*,
 C. J. There is this difficulty in applying the rule of
 appropriation, that these sums appear to have been paid
 in for specific purposes, and if those purposes had been
 fulfilled they would have stated that these sums of
 money had been paid in for a specific purpose, and had
 been so appropriated.] [Sir G. Rose. The mere pay-
 ment of money will not discharge the liability of *Ross*
 and *Gray* ; unless you get rid of the old contract you
 cannot have a new one.] I submit that you must, in a
 running account, always apply the last payments to the
 discharge of the previous items, and that is the inevit-
 able consequence of running accounts. [Sir J. Cross.
 You have a course of dealing between two fluctuating
 parties for 25 years—that is the strong point you rest
 on—you have the officers of the Treasury changing, and
 the partners in the concern changing : but every year
 the accounts are going on, and ultimately you say there
 is such and such a balance.] It is as if a fluctuating
 mercantile firm dealt with a fluctuating banking firm ;
 and at the end, when the bankers become bankrupts, it
 turns out there is a general balance due from them of a
 certain sum. There is no specific appropriation further
 than this, that every year there is a sum paid in for
 such and such a regiment ; but there is no specific sum

of 91,879*l.* mentioned here. It is simply the aggregate of certain balances due in respect of several regiments. We might, perhaps, instead of proving for the balance 91,879*l.*, take the account of each regiment by itself; and looking at the mode in which the account has been kept, each balance has been set forth in each account, and then at the end we find there is a general balance of 154,000*l.*; and that is the way in which I contend we are entitled to prove for the full amount. That if there have been a succession of partners,—if a running account has gone on without notice of any break at the time the new partner came in, or the old one went out,—and if you find too, at the end, a running account on both sides, (for that is the point, and it is not where the sum remains neither increased nor diminished,) where we find that at one period, in 1783, there was a balance of 23,000*l.* against the government, we are to look at the case as it stands in the last partnership at the period of the bankruptcy. And, taking the instance of the 15th regiment of foot, when a balance of 7305*l.* was found due to the Crown, if the bankruptcy had then happened we should have been entitled to prove for that entire balance, though part of it might have been incurred prior to 1780, when *G. Ross* retired.

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Mr. *Swanston* and Mr. *C. R. Turner*, for the assignees. Upon the hearing of the original petition in this case, an affidavit of Mr. *Mackay* was referred to, whereby he states "that no part of the sum of 91,879*l.* now claimed to be due from *Ross* and *Ogilvie* to the Crown, ever was issued or paid to them as partners, or was applicable to any portion of the specific business carried on by them from June 1780; and that all the

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monies actually imprested by the government into their hands were issued by the government for specific objects, and were paid and applied to the different objects for which such monies were issued, excepting so far as the balance of credits in account amounting to 54,967*l.*, which remained unclaimed in the hands of the bankrupts, belonging to different officers and other individuals, can or may be considered or held to be unapplied." This disposes of the case of appropriation. It proves that every sum issued to *Ross* and *Ogilvie* was applied by them to the specific purposes for which they received it, with the exception of the 54,967*l.* It is only the mode in which the accounts were kept that can create a momentary doubt in this case. Conceding, for the purposes of the argument, that if *Ross* and *Ogilvie* adopted this debt of 91,879*l.*, and if they adopted it as a debt for which they were responsible, there would have been a right of proof. Now what is the case of adoption? The officer has reported that there has not been a transfer, unless one is to be inferred from the circumstances stated by him. Now the only circumstances stated in that report were very concisely stated in one sentence, namely, "that the accounts had been transferred into new books by the new partners without any rest, and that accounts had been rendered by the new firm which included the fragments of this aggregate of 91,879*l.*" These are the only facts upon which the proposition of adoption or transfer is to be founded. Now the officer has also found that those accounts were delivered in a particular form. The Court must see that those accounts represented only the receipt of sums issued by the government, and the application made of them on account of the regiment.

They do not designate any debtor—no person is designated as a debtor. It is merely an account made out for the convenience of stating in a summary manner the amount issued in respect of each regiment, and the application made of it. It is impossible for any one, looking at these accounts, to infer whether any one is indebted to the government or not, and it is impossible to infer who is indebted, if any body is. They were only accounts of certain sums issued on certain days during the year. The names of the partners, or of any other debtor, nowhere appears in them. All that can be inferred from these accounts is, that during such a period such sums had been received for the purposes of the regiments, and that those sums had been paid for the purposes of the regiment. [*Erskine*, C. J. The accounts were rendered by the bankrupts.] With respect to that there is a fluctuation in the mode of rendering the accounts; some are subscribed *Ross* and *Ogilvie*, some *Ross* and *Gray*, and some *A. Gray* alone. There is that fluctuation after the year 1780. The whole delivery indeed was after the year 1780; therefore, the observation as to the manner in which they are signed, applies to that subsequent period, but there is nothing to show who were the debtors in either account; and supposing that instead of the intention of the parties being left in obscurity, it had appeared distinctly in evidence that they did not intend to adopt the debt, the mode in which these accounts would have been delivered is precisely the same as they now appear to have been delivered in. This would have been exactly the course of dealing which would have been consistent with such intention against adoption. They represented transactions since and prior to 1780, but they did not repre-

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sent in either case the situation of debtor or creditor. The other side have relied on a class of cases, none of which we dispute, except the last referred to, which has been varied by a subsequent case. The analogy of an account between a banker and his customer has been resorted to. When the nature of the accounts thus rendered has been explained, it must be apparent that there is no sort of analogy between the two cases. The account rendered by a banker to his customer represents the two parties in the situation of debtor and creditor. The balances represented by that account are the balances due to or from the firm, and there can be no question but such an account as that (as far as any document can accomplish such a purpose,) shows an adoption of the debt. Here, then, the cases, instead of being parallel, are directly contradictory. In the case of a banker there is a statement of a debt as due from certain individuals to certain other individuals, whereas in these accounts there is no such thing. The account rendered by a banker would only be consistent with one of two alternatives, either an intention of the new firm to adopt, or not to adopt, the account of the old one. The account here would not undergo in any respect the slightest variation in either of those cases. These accounts therefore afford no test of adoption, and there is no other circumstance in the case which affords any evidence of it. The accounts required of the agents were those of the money issued by the government on account of several regiments, and it was never till about 1820 that any one thought of calling for accounts of what the agents owed to the government.

Besides, why should adoption be presumed in such a state of circumstances, where there is not the slightest

evidence of any consideration passing to *Ross* and *Ogilvie*, for which they should adopt this large debt of 91,879*l.*? It is not the mere case of the continuance of a firm where, there being four persons in partnership, a fifth is introduced, and the fifth adopts the debts of the four, and continues the transactions of the four, and becomes jointly interested with the four; nor is it like the case of one of four partners retiring, and the three remaining taking the debt upon themselves; because, in this case, the debt was originally the debt of *Ross* and *Gray*, and never became the debt of *Ross*, *Gray*, and *Ogilvie*. *Ogilvie* was a stranger to the former firm, and what consideration passed for his accepting so large a liability? The Court has before it the report of its officer, whereby he negatives most distinctly any presumption that any part of this 91,879*l.* passed to *Ross* and *Ogilvie* on the formation of their firm. Here, then, *Ogilvie*, a stranger, would, for no consideration, be rendering himself liable for the debt of third parties. As to the doctrine of extinguishment, that is disposed of by the affidavit of Mr. *Mackay*, which shows, that so far from money being paid in generally to the agents, and sums being paid out by them, and accounted for generally, the agents received specified sums expressly appropriated for particular purposes, and that such sums were accordingly specifically devoted and disbursed for those particular objects. Each issue was on account of a particular regiment, and was accordingly appropriated thereto by the agents, excepting the balance of 54,967*l.*, which the Crown is of course entitled to prove.

But the most important point is this; has the Crown assented to adopt the new firm of *Ross* and *Ogilvie*, and

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to abandon its claim upon the old firm of *Ross and Gray*? as it may be taken as clear, that unless the claim of the Crown against the old firm is gone, the Crown has no right to come against the estate of *Gray and Ogilvie*. *Ex parte Williams, re Joseph and Hughes* (a). If there has been no abandonment of the claim against the original debtor, if the liability of the original debtor remains in this case, there is an end of the right to prove this claim against the estate of *Gray and Ogilvie*. Now *Clayton's* case has been referred to by the petitioners' counsel. Let us see what that case was. *Devaynes, Noble & Co.* were partners together; they became bankrupts, and at the time of their bankruptcy there was a debt, we will say, of 1000*l.* due to *Clayton* from the firm of *Devaynes, Noble & Co.* After the death of *Devaynes*, *Clayton* continued to deal with *Noble & Co.*, they being the surviving partners of the firm. He drew out monies in respect of the balance that was due at the time of *Devaynes'* death; his account having been delivered to him, showing that specific balance. He subsequently paid in further monies, and he drew other monies out again; and so it went on till the bankruptcy of *Noble & Co.* At the time of the bankruptcy of *Noble & Co.* he had in fact drawn out more monies than were necessary to exhaust the balance due at the death of *Devaynes*; but he had also paid in certain sums, which, if they were ever to be set against the amount he had drawn out subsequently, still left due to him a portion of the balance due at the time of *Devaynes'* death. He claimed to prove that portion of the balance against the estate of *Devaynes*, but the Court said, "No! you cannot do that, because there being no appropriation of

(a) Buck, 13.

particular payments, either by debtors or creditors, the first sum drawn out must be deemed to exhaust the first sum paid in, and so toties quoties." That is the simple result of that case. But the Court will observe there, *Clayton* was drawing on the parties who at law were liable to his demand. The continuing partners in the house were the parties who, at law, were liable to *Clayton* for the payment of his debt; and, therefore, if, by the course of accounts, the continuing partners were the parties liable at law to pay the debt, and did in fact pay it, what right could there be for *Clayton* to come into a Court of Equity and claim to have the accounts taken otherwise than in the ordinary course? But that is a case distinct from the present. The Court here is asked to conclude that the Crown assented to become the creditor of *Gray* and *Ogilvie*, and to discharge *Ross*, although the Crown was in ignorance as to the state of accounts. It did not, until after the bankruptcy, know that the 91,000*l.* was due from *Ross* and *Gray* at the time of the retirement of *Ross*; and no man can be said to have come to an agreement to adopt one party as his debtor, where another party in law was his debtor, unless he did it with a full knowledge of all the circumstances of the case,—with his eyes open, with the means of having an option in his own mind whether he would do it or not, and with full knowledge of existing facts. Now, in *Clayton's* case, not only had *Clayton* a balance in the hands of the bankrupts at the time of the bankruptcy, but he had deposited certain exchequer bills with them previous to their bankruptcy. Those exchequer bills *Devaynes & Co.* fraudulently sold. The balance which was drawn out by *Clayton* after the bankruptcy was sufficient, not only to pay the balance due to

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Clayton at the time of *Devaynes'* death, but it was also sufficient to pay the sum which came to the hands of *Devaynes & Co.* in *Devaynes'* lifetime in respect of the exchequer bills; but inasmuch as it appeared that the exchequer bills had been fraudulently sold, the Court said, "How can we say that *Clayton* drew upon the proceeds of the exchequer bills, when he did not know they had been sold, and when he treated them as still remaining in their hands as exchequer bills? It is impossible, therefore, to intend an agreement arising out of circumstances of which he was ignorant." And whether it were a case of fraud or ignorance, the rule of law and of equity must be equally applicable. It is simply this, that a party cannot be deemed to arrive at an agreement to adopt one person as his debtor in lieu of another, while he is ignorant of the amount of the debt due to him from that other person. And when he first arrives at the knowledge that he has a claim against that other person after his bankruptcy, that shuts out the supposition, that up to that time there was any assent on his part to adopt a new in lieu of an old debtor. It leaves open to him his remedy, unless, in fact, he has been substantially satisfied. Now this case is liable to be taken in two ways: First of all, *Ross* and *Gray* say that they have satisfied the Crown; are they in a situation to say they have paid the debt they owed the Crown? Are they in a condition to say they have done any thing which amounts to a payment? Have they discharged it, or given any thing in the shape of payment or satisfaction? or has the Crown, with full knowledge of all the circumstances of the case, consented to discharge them and to take the new debtor? There is nothing of the kind in this case, unless the Court is to

say, that if a man with his eyes shut receives accounts from a party, that operates as a satisfaction from the party who was originally liable. Then again, there is another fact : from the year 1783, before *Ross* died, and whilst *Ross*, therefore, must have remained liable, (for in 1783 it could not be contended that *Ross* was discharged,) a new course altogether was pursued with respect to army agents ; for an act of parliament passed, 23 *Geo.* 3. c. 30. which directs that the Secretary at War and the Paymaster of the Forces shall perform certain duties. In the first place, an estimate is to be prepared of the amount which will be required for the army ; that amount is to be paid into the Bank of England from time to time ; the Paymaster of the Forces is to communicate to the Secretary at War the sums which will be required for the purposes of the different regiments, and an issue is then made to the agents for the particular purposes of those regiments. He could not, therefore, appropriate the sums he received otherwise than in the manner which the law allows. He must appropriate them in the manner directed by the act ; and, therefore, it cannot be contended that he was at liberty to apply the monies he received from 1784 under the authority of the act, by way of payment of the sums due from *Ross* and *Gray* to the Crown, before that act was passed. He must appropriate them to the uses of the regiment in the particular mode pointed out by the act. These accounts, therefore, though they were run into one another, do not fall within the principle, that the first sum paid in satisfies the sum first drawn out, or any thing of that description, for the agent is bound by the act with respect to the appropriation. The Court knows perfectly well that, according to the general rule, the debtor is first of all at

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liberty to appropriate the sums he pays to his creditors on any particular account he pleases. He may owe a judgment debt, a bond debt, or a simple contract debt; but if he pays money to be applied in discharge of either, the whole, or pro tanto of the simple contract debt, the creditor is bound to receive it in the particular manner directed by the debtor, when he makes the payment. Then, if the debtor fails to do that, the creditor has the right; and if neither party adopts the right, then the course of payment in *Clayton's* case intervenes. But here the act of parliament interferes, and the public act directs the agents to make the payments for the purposes of the particular regiments in the mode in which the issue is made to them under the act. That act was repealed by the 40 Geo. 3. c. 58. and there, for the purposes of this case, similar provisions are enacted. Now there is no case where one man has been held to assent to the transfer of a debt to another, and to take the other, except in a settled and ascertained balance; so that the party acts with his eyes open. In *Heath v. Percival* (a) Sir *Stephen Evans* and *Percival*, partners, had given a bond to the plaintiff for 1000*l.* and interest. Upon the dissolution of the partnership in 1693, it was agreed that all the joint bonds should be discharged by *Evans*, to whom a further application was made by the plaintiff in 1708 for payment; and it was agreed between them, that the interest of the bond should be increased to 6*l.* per cent., and some of the increased interest was paid, and the partner *Evans* then became bankrupt. It was held, that he might proceed against the assets of the defendant, the other partner, for the sum due, and a decree was made in the

(a) 1 P. W. 682.

plaintiff's favour. *Percival* objected, that *Heath* by his conduct had agreed to take *Evans* as his substituted debtor, and that he had come to a new agreement with him upon the subject of interest, and that the interest had been paid on that agreement; and there the Court of Equity held, that it was not sufficient to discharge the original debtor, but that he remained liable. In *Daniel v. Cross* (a), bankers, upon a deposit of money with them, paid notes bearing interest. The partnership was dissolved. One of the partners soon afterwards died, and his creditors were called by advertisement. Another partnership was formed by the survivors and others, who issued notes of the former partnership, and paid the interest of the deposit notes for nearly two years, when they failed. The assets of the deceased partner were held not discharged, and the Lord Chancellor there said, that the receipt of interest from the new partner did not discharge the estate of the deceased partner, and that the creditors of the old partnership could not come upon the new one, though they had paid interest upon the debts. [Sir *J. Cross*. In the latter case, the retiring partner, I suppose, left his name still upon the notes, and with an authority to issue them.] Not with an authority to issue them, but the creditor was the deposittee of these notes. The next case is *Gough v. Davis* (b), there it was held, that a person depositing money with bankers, and taking their accountable receipts, did not, by continuing to leave his money in the bank after a dissolution of the original firm, and the constitution of a new one, which consisted of some of the members of the old firm and of other persons, discharge the former partners who had gone out, although

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(b) 4 Pri. 200.

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he received interest regularly from the new firm, gave them no notice, and continued to transact business with them in the common course, and that for a period of four years, and until they became insolvent. In that case, Mr. Baron *Wood* says, "there is not any evidence that the plaintiff agreed to release the old and receive the new firm as his debtors. The only evidence is, that the new firm paid interest upon both debts, one of the new having been a partner in the old. What does this prove? The plaintiff might not have known that a new partnership was formed; but even if he knew that the new firm took upon themselves the debts of the old, it would not have affected him in discharging them, nor would any thing passing *inter se* have done so. There is nothing which I can see, except the mere payment of interest, which looks any thing like a discharge, and I cannot think that can discharge the old firm; more especially as one of the partners was the same. At first I thought there had been a balance struck and carried to the debit of the new partnership account, and that the plaintiff had known of that, and had assented to it. If he had done that, it would have been a different thing, but that is not the case: no balance has been struck. It does not appear that they have in their own books done so." In *David v. Ellice* (a) *A.*, *B.*, and *C.* were partners in trade: *A.* retired, and notice of that fact was given to *D.*, a creditor of the firm, and that *B.* and *C.* continued the business, and assumed the funds, and charged themselves with the debts. The balance due to *D.* was transferred to his credit by the new firm, and *D.* was informed of this transfer and assented to it, and afterwards drew upon the new firm for a part of the

(a) 5 Barn. & Cres. 196.

balance, and they accepted and paid his bills. The new firm having become insolvent, it was held that *A.* continued liable for the debt due to *D.* from the old firm. It was upon the simple principle that *A.* had not paid the debt nor given satisfaction for it. There was nothing amounting to payment, discharge, or accord and satisfaction. Nor is there any one of those single ingredients to be found in the present case. [*Erskine*, C. J. Lord *Tenterden* there draws that distinction, that there was no new party there who had consented to become a debtor; but in this case, if the fact is made out, there is a new party.] But there must be two circumstances, the assent by the creditor, as well as by the debtor. [*Erskine*, C. J. But that was not the ground on which that case was decided. The ground there was, that there was no new party.] There is yet another case where that ingredient was formed, viz. *Kirwan v. Kirwan* (a). In 1798 three persons, *John*, *Clement*, and *Matthew Kirwan*, became partners under the firm of *John Kirwan & Son*. In 1799 *John* died, and *Clement* and *Matthew* continued under the same firm till 1802, when *Clement*, *Matthew*, and *Nicholas Kirwan*, the defendants, became partners under the same firm. Whilst the business was carried on by the defendants, *Anthony Kirwan* was a creditor for 12,000*l.*, for which the firm paid him 5*l.* per cent. interest. *Anthony* was in the habit of drawing on the firm as his occasions required, and the amount of the debt was reduced by payments beyond the interest. On the 30th July 1817 the balance due to *Anthony* was 11,161*l.* In June 1824, *Clement* retired, and in December following *Matthew* retired. The accounts continued to be made up annually, and in 1829 the debt was reduced to 9288*l.*

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(a) 2 Crompt. & Mess. 617.

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In 1825 notice of the dissolution of the partnership was given. After *Matthew* and *Clement* retired, *Nicholas* took in his brother-in-law *Kelly* as a partner. The accounts of *Anthony* were transferred to the new firm. The balance was struck annually as before, and the accounts were rendered to *Anthony*, and after his death to his widow and administratrix. *Anthony* and the widow received monies on account from *Nicholas* and *Kelly*. It was there held, that the widow of *Anthony* was entitled to recover the balance due from *Matthew*, *Clement*, and *Nicholas*, no agreement being shown by *Anthony* or her to take the new firm as their debtors. In that case there were all the ingredients of transferring the principal debt to the new firm. The accounts were rendered by the new firm, and the payments of interest were made by the new firm.

Lastly, we come to the proceedings taken by the Crown itself. From them it is evident the Crown looked to *G. Ross* alone as the debtor, and it is impossible for the Crown now to contend, in the face of that, they have discharged him and have adopted *Ross* and *Ogilvie* as the debtors. The Crown cannot have two debtors, that is impossible. [Sir *G. Rose*. Your observation is quite decisive as to proof, but is it equally so as to claim?] Certainly, because if there is no doubt as to the right of proof, there is no pretence for making a claim. Every party must be bound by his own acts. Suppose these parties went to Scotland, and failed to satisfy the Courts there that they have any right to sue their original debtor, does it at all follow that they have a right to sue their substituted debtor? This Court must apply the law as it exists in England, and here the strongest evidence that can be brought against a

man, is the evidence of his own acts and proceedings. And in the absence of any single authority which goes the length of saying, that a man is to be allowed to take the course that has been here pursued, and to blow hot and cold—we hope this Court will not allow the bankrupt's estate to be charged with so enormous an amount as this, to the prejudice of the real and undisputed creditors of the bankrupt. This Court ought not to allow a claim to be entered, unless it is satisfied that the Crown makes out a clear and presumptive right of ultimately ripening such claim into proof. With regard to the alleged admission on the part of the assignees, the Court will not allow them, who are mere trustees for the bankrupt's estate, to make admissions to the prejudice of the creditors, and they cannot therefore be used as any argument against the respondents, on the present occasion.

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Mr. *Wightman*, in reply. That which the assignees have said upon the subject is, I maintain, of the greatest weight in this case. They state, in their condescendence in the action of reduction, “that their intermissions with *G. Ross*'s estate were greatly overbalanced by debts and obligations of *G. Ross*, which had been satisfied by *Ross* and *Ogilvie*, and that as *Ross* and *Ogilvie*, on succeeding to the business of *G. Ross*, took upon them all the debts due by him to the different regiments for which he was agent; they carried on the business in the very same manner, and with the same books; and also that *Ross* and *Ogilvie*, on taking the management of the business, instead of getting a final clearance with *G. Ross*, and beginning on an entirely new footing, came, in fact, entirely into his place, took upon them all his

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obligations, and carried on the business with no other change than the substitution of their names for his, and that they, therefore, continued the business with the same books and in the same train in which it had formerly been carried on, and that his regimental debts were in the different regiments accounts debited as their own. That in 1820, the assignees of *G. Ross* and *Ogilvie* applied to the Secretary at War, to furnish them with an official statement of the balance due to the Crown from *Ross* and *Gray*, at June 1780, in support of their suit. That Lord *Palmerston*, in his reply, dated 7th November 1820, stated, that a similar application had been made more than once to his department, particularly in 1817, but that after every possible attempt to separate the balances of *G. Ross* up to June 1780, from those of *Ross* and *Ogilvie*, subsequent to that date, it was found to be wholly impracticable. That at the renewed instance of the surviving assignee, a separation was afterwards, with great labour, made at the War Office, and a statement furnished, and the sum of 91,879*l.* subsequently appeared to be due to the Crown from *Ross* and *Gray* at June 1780, in respect of the regiments of which *Gray* and *Ogilvie* afterwards became agents." Now it is said that in the face of our proceedings against the estate of *Ross* in Scotland, we have no right to come upon the bankrupt's estate. The claim in Scotland was made in 1832. In November 1831, thus writes Lord *Palmerston* to the assignees, "with reference to my letter to you of the 14th July last, I am now to acquaint you that a careful investigation has been made into the accounts of the several regiments in the agency of the late *G. Ross*, from June 1775 to June 1780, with the special view of determining the public balances due by

or to him at the latter date. You will receive, enclosed, a statement of the result of the said investigation, as far as relates to the accounts of regiments which passed into the agency of Messrs. *Gray*, afterwards *Ross* and *Ogilvie*, by which it appears that *G. Ross* was indebted to the public, upon the whole of the said accounts, in the sum of 75,835*l*. In ascertaining this balance, credit has been given to *G. Ross* for every claim to which he is known to have been properly entitled, including the regimental contingent bills, and lodging money, and bread accounts, which latter services have been usually allowed by special warrant. I have further to observe, with reference to my letter of the 17th October 1811, that as the whole of the sum thus found due in *G. Ross's* accounts to June 1780, whether for or against him, were taken up and formed part of the accounts rendered to this office from June 1780, by *Ross* and *Ogilvie*, no claim for such balances was ever made on the part of the public against *G. Ross*, either individually, or as a partner in the house of *Ross* and *Gray*; especially as *Ross* and *Ogilvie* were considered to be the creditors to the public, upon the general state of the accounts from June 1775 to December 1783. But as the balances were either admitted by the latter gentlemen in their accounts, or taken in the public settlement with them, it will of course rest with you to adopt the necessary measures for the recovery from the estate of *G. Ross* of the said sum of 75,825*l*. remaining due by him as above mentioned."

Now, in addition to that, we have this fact: for one of your Honors asked in whose hands did this balance of 91,879*l*. lie in 1783? Why, it was not existent. And that is the answer I have to make to all the cases

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which have been cited by the other side as to existing debts, and as to the adoption by parties. The debt was gone, and was non-existent. Somebody must furnish the accounts, and the only persons to do it were those who knew them best. *Ross* and *Ogilvie*, in 1807, furnished the accounts, from which it appeared that, in 1783, all the balance due from *Ross* and *Gray* had been completely obliterated; and so far from the public having any claim, there was a balance due to *Ross* and *Ogilvie* of 38,561*l.* That is the mode in which the balance of 91,879*l.* is accounted for. Probably, within a twelvemonth, it had been totally obliterated. At all events, that has been done which establishes the case that *Ross* and *Ogilvie*, according to the statement of their own representatives, the assignees, who are now opposing the proof, had adopted the whole; that they have made it a part of one general running fund; and then we find it, on the statement of *Ross* and *Ogilvie* themselves, that as early as 1783 the debt had been totally wiped off, and that there was a debt due from the public to them of 38,561*l.* If ever there was a case furnishing strong and cogent evidence of an adoption by one party continuing the accounts of his predecessor, and by paying money, wiping off various balances, this is the very case.

ERSKINE, C. J.—I confess it appears to me that the Commissioner has come to the right conclusion; at the same time there is that circumstance which has been alluded to, and to which the attention of the counsel has been called, namely, the statement made by the assignees themselves, that the new firm had taken upon themselves the debt of *Ross* and *Gray*. Had it not

been for that I should have been of opinion that this petition ought to be dismissed ; but that circumstance induces me to yield to the suggestion, that a claim should now be entered for the 91,000*l.*, in order that the assignees might, in conjunction with the Crown, work out their remedy against *Ross's* estate, or that it should be ascertained, by the decision of the cause in Scotland, whether the Crown is entitled to recover from the estate of *Ross*, or whether there are circumstances which show that *Ross* was released from the debt originally due ; because, it appears to me, that the whole case turns upon that simple fact, whether *G. Ross* has, by any thing that has taken place between these parties, been released, or whether his estate has been released from the liability which most certainly, by the acknowledgment of all sides, once attached to it. It appears that now there is a deficiency of 146,000*l.*; that of that 146,000*l.* 91,000*l.* had been deficient before the year 1780, at which time *Ross* and *Gray* were the agents of the different regiments. In 1780, therefore, *George Ross* and *Gray* were the parties indebted to the Crown to that amount, 91,000*l.* But it is said that the new firm of *Ross* and *Ogilvie* have since taken upon themselves that liability, and that they are now liable not only for the deficiency of 54,000*l.* that has occurred since that time, but also for the other sum of 91,000*l.*, which had been due from the original firm of *Ross* and *Gray*. Now, if that liability attaches to them, it must be by virtue of some contract. There may be no specific contract entered into in so many words, but the contract may be proved by the circumstances attending the course of dealing between the parties subsequently ; and if it had appeared that accounts had been rendered whereby

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Ross and *Ogilvie* had charged themselves with this sum of 91,000*l.*, and that the government had acquiesced in that charge, and that when in the year 1783 the account was turned, they allowed *Ross* and *Ogilvie* to take credit to themselves for the sum of 38,000*l.*, certainly, then, I should have said that would have been sufficient evidence of acquiescence on both sides, and of a contract between them that *Ross* and *Ogilvie* should take this debt upon themselves, and that *G. Ross* should be exonerated from his liability. But no accounts appear to have been rendered at that time. No accounts appear to have been rendered till about the year 1792, and then, in consequence of letters sent to *Ross* and *Ogilvie*, accounts are rendered. In those accounts are included all the items of advance by the government, from the earliest date down to the year 1783, including, therefore, the advances before the dissolution of the partnership of *Ross* and *Gray*; but there is nothing in that account which assumes expressly the liability of *Ross* and *Ogilvie* to pay that balance; but if there had been, there is no assent on the part of the Crown from that time, down to the date of the bankruptcy, at which period, I think, we must stop, except for the purpose of evidence of some prior assent. Down to the year 1804, there seems to be no act done on the part of the government upon which it could be contended for one moment by *G. Ross* that they had released him from his share of that debt, by consenting to take as their debtors *Ross* and *Ogilvie*, the new firm. Now, unless the government had consented to release *G. Ross*, there was no consideration for *Ogilvie* undertaking to pay that 91,000*l.*, because in that case he would be assuming a debt without any advantage; because there is no evidence that

this sum of 91,000*l.* was left in the new firm. There is no evidence that there was any part of *G. Ross's* estate left in the new firm, as a consideration for their taking upon themselves the debts of the old firm. The only consideration that could be pleaded, as it appears to me, for a promise by *Ogilvie* to pay this debt due from *Ross* and *Gray* would be, the discharge of *G. Ross* from his liability to those deficiencies by which the Crown had then become injured to that extent.

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It is said there is the consideration of continuing the business. But I do not think that seems to be any consideration. It seems to have been on the ground of their continuing the agents of the regiments. They do not appear ever to have contemplated that the continuance should be to those persons, upon the ground that they should take the debts of the former agents; on the contrary, they do not appear to have known whether the former partnership was indebted to them or not; and there is no ground, as it appears to me, for supposing that the continuation of the agency by *Ross* and *Ogilvie* formed any part of the consideration for the assumption of this debt upon them; and if that question was left to a jury, I think they would say, that that formed no part of any consideration; therefore, I should say, there would be no consideration for that contract, if it were proved. But I confess I have great difficulty in gleaning from all the circumstances of this case, prior to the year 1804, any evidence of a contract between the government and *Ross* and *Ogilvie*, that *Ross* and *Ogilvie* should take upon themselves this original debt which was due from *Ross* and *Gray*. The subsequent conduct of the parties may justify us in allowing the claim to be entered, in order to see whether they can furnish evidence to show there was

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an actual release of the estate of *G. Ross*. I confess the facts now before me lead my mind to no such conclusion; therefore I think the proof as to this 91,000*l.* ought not to be admitted. The proof of the 54,000*l.* there seems to be no difficulty about. As to the 91,000*l.* I have no objection to the claim being admitted, leaving the parties to work out their evidence in support of it in the cause in Scotland, by means of which the money may be recovered from the estate of *G. Ross*.

Sir J. Cross.—This case is involved in very great obscurity, in consequence of the great length of time that has elapsed since it occurred, now a period of fifty-four years, when all the parties to the original transaction are dead; the Court must, therefore, collect it as well as it can from the fragments of circumstances and facts that those parties have left behind. The first feature in the case is this :—In the public accounts these army agents, who have become bankrupts, stand indebted in a balance of 146,000*l.*; and the officers of the government apply to the Commissioners to prove that debt, which has grown out of a course of dealing with the two bankrupts through a period of twenty-four years before their bankruptcy. One would have thought it was a very clear, straightforward case, if the amount of the balance was undisputed. But the assignees object to the proof of the debt to the amount of 91,000*l.* on a point of fact which they suggest for the first time, at the end of twenty years after the bankruptcy. They say this, “Why, true it is, that your balance may be 146,000*l.* according to the regular current of your accounts for twenty-four years before the bankruptcy, but antecedent to the commencement of those accounts which you have

kept with the bankrupts, there was a private dealing between the bankrupts and the outgoing partner respecting a sum of 91,000*l.*, or rather there was no dealing between them at all; but the outgoing partner was a defaulter to the amount of 91,000*l.*, without his partner, who remained behind, being conscious of it; but we have now discovered that of this 146,000*l.* that is owing to you, 91,000*l.* of it was owing by a partner who went out fifty years ago." Upon whom is the whole burden of proof incumbent to make that separation of the 91,000*l.* from the rest of the debt of 146,000*l.*, which has grown out of the course of dealing for twenty-four years? Upon whom is the burden of proof? One would suppose it was on those who take the objection. Now it is difficult and almost impossible to discover—it is difficult to imagine and impossible to discover,—how so large a sum as 91,000*l.* of the public money could have got into the hands of the agents. But from that fact, one must naturally presume, in the absence, and in the silence of all evidence, that it was the course of business in those days for the Crown to intrust the army agents with so large a sum as 91,000*l.* to be applied to the public use. Now it seems to me that the first fallacy, if I may presume so to call it, occurring in this case, is the calling it a debt owing to the public, or a deficiency or default on the part of the then partners. It seems to me, upon the fair construction of the facts now before us, that it was a trust of public money to the amount of 91,000*l.* in the hands, in the first instance, of *Ross* and *Gray*, till the year 1780, not a debt for which the Crown could have sued, but a sum of money which the Crown had intrusted in the hands of those agents to apply to the purposes of the

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Crown, and that they were rather in the nature of trustees and agents for the public than debtors. Then in the year 1780, Mr. *Ogilvie* comes into the firm in the place of *G. Ross*, and continues the same identical business with *Gray*, without any line of separation being drawn between the old and the new accounts. *Gray* and *Ogilvie* from henceforth carry on the same identical accounts. Now the first question is, at the end of fifty-four years, what are we to presume became of that 91,000*l.* in the hands of the parties? All evidence is silent upon the subject. We must presume, therefore, that that was done which would be done by reasonable men under such circumstances, and it is utterly incredible to me that one partner would remain behind, and leave so enormous a debt as 91,000*l.* unexplained or uninquied after; that a new partner should come in the same way, making no memorial of a bygone debt or deficiency to the enormous amount of 91,000*l.* But it is perfectly consistent with what the petitioners say was the real state of the case, namely, that there were effects equivalent to the 91,000*l.* It is true the agents held money belonging to the Crown to the amount of 91,000*l.*, but he who has got 91,000*l.* in hand or 91*l.* in hand to pay to the use of his employers, must, I should humbly conceive, at the end of twenty-five years be taken to have succeeded to the receipt and application of that money, all evidence being silent upon the subject; and it strikes me as being like a very familiar case, which being on a small scale, is now within the grasp of one's understanding, and which I took the liberty of throwing out to the counsel. Suppose a great commercial house had employed an agent,—let it be in a colliery or manufactory, or any thing else,—we shall suppose a set of partners

employed *A.* to pay their weekly wages, and gave them 90*l.* or 100*l.* for that purpose; *A.* goes out of office and he turns over his business to *B.*, with a balance of 91*l.* in his hands, and all his accounts entire. He says, "There, take up this business, and be you henceforth the agent, as I have been hitherto, and there are all my accounts." The successor takes to the accounts, he receipts them, and one state of the affairs is, that there was 91*l.* in the hands of the agent. We then suppose that *B.*, the succeeding agent, carries on the same mode of accounting, and never discloses to the employers that there is an old item of 91*l.* with which he is not chargeable, but goes on keeping the accounts regularly in the same manner as his predecessor, in which accounts the 91*l.* is indiscriminately blended. Would he, at the end of twenty-four years, say, "It is true, I have been paying wages and receiving money from you for that purpose, the 91*l.*, it is admitted, has been a hundred times over liquidated in different shapes, but I tell you, that twenty-four years ago, when I came into the office, my predecessor owed you 91*l.*; I cannot trace it in the accounts, I only can find that he owed you 91*l.*, and you must take that in payment." Now that seems to me very like the present case, and I can see no substantial difference. The case has been put on the other side, first on the ground that it must be shown that there was an adoption of the debt there was owing by the first firm. Now, in the view that I have taken of it, there was no debt to be adopted, properly speaking. There was a sum of money which appeared to have been received by the firm, of which *Ogilvie* became one, to be applied to the public use. That it was there to be applied to the public use, till the evidence shows to

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the contrary, is, in my humble judgment, the fair inference to be drawn from the wreck of evidence that is left for us to form a judgment on; and, therefore, as far as regards any question of adoption, it not being in my view of it a debt, there was no debt, strictly speaking, to be adopted. But I will suppose it to have been a debt, and then what evidence is there of adoption? They became agents of the public to pay away the public money, and they never once gave the slightest hint to their employers that there was not less than 91,000*l.* in their hands. They never gave the slightest intimation of it: and, therefore, I can have no doubt that when the partnership was formed, there was "either in meal or in malt," to use a vulgar phrase, the 91,000*l.* It was somewhere in the accounts. We cannot find it out, though the parties to these transactions could have found it readily at the time. But when all evidence is asleep and gone, the reasonable presumption seems to me to be, that the money was passed over and accounted for between these parties when they formed the second partnership. Then the second point made is, that there is no acquiescence on the part of the Crown to that arrangement. The officers of the Crown began, so far back as the year 1780, to carry on the same identical accounts with the bankrupts as they had carried on before with the retiring partner and one of the bankrupts. The officers of the Crown continued that identical account for twenty-four years. The officers of the Crown, in the final result of those dealings for twenty-four years, produce a balance of 146,000*l.*; and it is never suggested to the officers of the Crown, till after the lapse of twenty-five years after the formation of the new partnership, and twenty more years, I think, after the

bankruptcy, that any distinction is to be made with them, nor did they ever expect any such distinction could be made; inasmuch as the officers of the Crown began, in the year 1788, by recognizing the new firm as filling the office of agents towards the public, by identifying the accounts altogether, and considering the two persons who became partners in 1780, and the bankrupts afterwards, as the persons with whom they were dealing, and as persons they were trusting with the public money; it seems to me that was an entire acquiescence, if it had been necessary, with regard to the original debt, if there ever was a debt. But how stands the matter a few years after the partnership, in the year 1780? Why, in the year 1783, it is discovered that the balance in hand, in favour of the public, was the sum of 38,561*l.* Who says that, in the course of the three years before the passing of the act of the 24 *Geo.* 3, the whole was not covered, and the whole of the 91,000*l.* was not actually paid by the new firm to the public use? It is said you must prove that. Is it possible, that the officers of the Crown can prove it? It was possible, and very probable, that it might have been proved, if the parties had been alive; but there being no evidence, it is perhaps too much to cast the burthen of proof upon the officers of the Crown to show that 91,000*l.* was not every shilling applied to the public use within the first year after the formation of the new partnership; and, by the way, with reference to the case I have taken leave to put,—with reference to the case of a private commercial house,—I mean the case of the agent *B.* succeeding the agent *A.*, and suppose the agent *B.* said, at the end of twenty-four years, “You must look to my predecessor in office, who quitted twenty-four years ago, and he will talk to you about that

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911."—Why, it would be thought ridiculous. The answer to that would be, "No action at law will lie against him now; and the presumption is, that you have received that balance which he held of mine twenty-four years ago, when you succeeded him in office." That is the legitimate presumption, according to my opinion, and according, as I apprehend, to all the rules of evidence to be applied by a court of law or equity, or by a jury. If the counsel were to go before a jury and put the question on that ground, I cannot but think they would be held to put it on a fair ground, if they said, "We rest upon the presumption that you took in and had that balance of the agent's account when you succeeded to it, and gave no notice that there was any default; and the burthen of proof therefore is upon you to show that there was that balance, for which you are not chargeable." It is clear, that the accounts of the Crown have been kept for twenty-five years before this bankruptcy, as against these two, for the whole money, there is no doubt about that. It is impossible to doubt that, for twenty-four years, the public accounts were kept as against these two bankrupts for the entire amount, whatever it might be. Then when the Crown has kept that account, is not this an answer sufficient in the mouth of *G. Ross's* representatives? "You come to us now at the end of fifty years, when you have been dealing with the successors of *G. Ross*, on the credit of their being accountable for that sum of 91,879*l.* All evidence is lost," they would say; but will any human being in his senses believe that if I went out a public defaulter to the amount of 91,879*l.*, my successors would never take any notice of it, or call me to account for it? "You must take it," they would say, "that it was blended in some shape or

other, equivalent to its full amount in the accounts passing from the one firm to the other;" or, to use a very appropriate expression in Lord *Palmerston's* letter, "the money passed into the agency, in the year 1780; as between *Ross* and *Gray*, and *Gray* and *Ogilvie*, it passed into the agency;—it was recognized as being passed into the agency for 25 years before the bankruptcy—it was treated as having passed into the agency by the officers of the government, and never treated otherwise by the bankrupts themselves." In that state of things, it seems to me, that the officers of the Crown are not bound to look to the estate of *G. Ross* for the 91,879*l.*, or any part of the balance which at the end of 25 years they have charged against their agents, with whom they have kept accounts to the amount doubtless of millions.

Then the last ground on which this claim to the proof is resisted, is put upon the subsequent proceedings, as they are called, of the Crown; and the Crown is spoken of as if it were an individual who must at one particular time, by a single act of volition, have agreed to transfer the account. I apprehend that there was no contract or agreement upon the subject, but it was taken for granted by all the parties; nor can I find there was any contract between the Crown and the first firm, except this, that the Crown trusted the agents with the money to be applied to the public use, and they contracted to apply the money they received to the use of the public. That is the only contract I can find in the evidence before us as subsisting between the Crown and *G. Ross*, in the first instance, and his partner *Gray*. There was no contract, therefore, of debt, it was a contract of agency, more properly speaking. The contract was, that the

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Crown entrusted *Ross* and *Gray* with the custody of nearly 100,000*l.*, to be applied to the public use. Having made that contract, the Crown afterwards allowed it to be shifted, namely, the contract of agency; and the Crown recognized and permitted that the contract to apply the 91,879*l.* to the public use, should be transferred to *Gray* and *Ogilvie*; accordingly *Gray* and *Ogilvie* were recognized as the authorized agents to apply that sum of money to the public use. That is the contract, and the only one that I can discover. The office of agent was first held by *A.* and *B.*, and in the second instance by *B.* and *C.*, and the change of the officer was recognized and sanctioned by the government.

Then, with regard to the subsequent proceedings, it is said, that the officers of the Crown have claimed this money recently from the representatives of *G. Ross*, who was the original party from whom the money was due; but they explain this distinctly, because, they say, "we had our information from you; it is you, the assignees, who have overhauled the accounts of the bankrupts, and from that research you have drawn out a result which was never known to us, and which, you say, was never known to any human being before you made the discovery, 20 years after the bankruptcy, that the balance against the old firm was this 91,879*l.*" Why, then, upon the faith of that information, and at the suggestion of the assignees, the officers of the Crown called the representatives of *G. Ross* to account? It is not like a case where a party must know what he acquiesced in, and what he has been doing, and so on; and, as I said before, talking of the Crown as if it was a thinking being, that had been acting from the beginning

to the end. The succeeding officers of the Crown, from time to time, do not know exactly what has been going on, particularly when you take into consideration the confusion in which the public accounts were; but the officers of the Crown, acting on the information they received from the assignees, try if they can recover any of this money from the representatives of *G. Ross*. They are now satisfied, as their counsel states, that it is in vain, under all the circumstances which by degrees have come to their knowledge, to seek any thing from those representatives; for *G. Ross*, in all probability, would have a distinct answer by saying, "It is fifty years ago and upwards, all the burthen of proof is upon you, all the presumption of law, reason; and common sense are with me. Then why stir up a stale demand of this kind against me? if you do, the burthen of proof is upon you." But then, on the other hand, with regard to the subsequent proceedings, it is answered by what has been read from the report of what the assignees have said: Binding neither party, however, by what they had said; but looking to the acts of the parties, from which alone we can draw our inference, it seems to me that there was full assent, and an undertaking to be accountable for what balance was in the hands of the firm: as soon as *Ogilvie* took a part in that concern he succeeded to the agency with all its benefits and advantages, and took it up as it then was. He succeeded to a public employment with a balance in hand in the books of that concern, and he took the employment, as it seems to me, subject to all that liability.

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ERSKINE, C. J.—There is one point which I omitted to notice in the argument of Mr. *Wightman*, which I

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will say a few words on, lest it should appear that I have not taken it into consideration, and that is, with reference to the subject of appropriation. I take it, that this case is very distinguishable from the ordinary case of a banker; for there, a person paying money into his banker's hands, is said to pay it in generally, and if he does not direct it to be paid specifically, it is applied to the first item of the account. I take it, that here the money was not paid into the hands of these agents, as a customer pays money into his banker's hands, but that it was paid in specifically for particular regiments, and for a particular time.

Sir J. ROSE.—I do not think it necessary to detain the Court by saying many words upon this case, because the principles by which it must be governed have been too long and too well settled by decisions, both in courts of law and equity, to leave any thing to be decided beyond the mere question of fact; which is just simply this, whether, when Mr. *Ross* retired from the partnership, the debt in question was by *Ross* and *Gray* transferred as a debt due from them to the Crown, and whether it was by the Crown adopted as a debt due from *Ross* and *Ogilvie*; and whether, by consequence, the separate estate of *Ross*, or the joint estate of *Ross* and *Ogilvie*, was liable. Now upon the question of proof, I am of opinion that it would be wrong to conclude any rights either of the parties may have against the separate estate of *Ross*, either by holding the proof of the debt to be admissible, or by rejecting it. The principle on which we interpose is the principle of claim, and is referable to protection, and nothing more. The statement that this Court has not admitted the proof, must be

understood as being put no higher than on a principle of protection; and without reference to what the ultimate decision between these parties may be, we have thought it right to interfere for their protection by allowing this as a claim only. It would be obvious that the essential question in this case is a very beneficial and operative one, how far proof is to be made against the assets of these gentlemen; but one essential question, which could only adequately be disposed of by having the parties here, would be, whether or not the estate of *Ross* was released as to this debt? We have no mode of bringing them here, and the extent of our jurisdiction is only an incidental mode of ascertaining that fact; and most injudicious would it be, for this Court to hold at once, that this proof is admissible against the joint assets of *Ross* and *Ogilvie*, when at the same time the question might be gone on with in the Court of Session, where it might be held that the estate of *Ross* only was liable, on a state of facts which we have not the jurisdiction or means to dispose of. The regular and proper mode, as it appears to me, would be for the Crown to put the assignees in a condition to meet that state of things, by arming them with the authority of the Crown, with a view to throw the burthen upon *Ross's* estate. It has ever been the practice in bankruptcy, and appears to me to be a most proper rule to give protection to insolvent estates. It does not follow, nor am I prepared to say, neither do I wish to say, that if the parties fail in asserting their right in Scotland, the Crown is to prove this debt: but if, on the other hand, the right as against *G. Ross's* estate is established, it will go to do away with the question of proof. We can make no order upon the Lords of the Treasury, but the only mode is, that the

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assignees should be put by those parties in such a situation as to the litigation in Scotland, as will enable them to prosecute the claim against *G. Ross's* estate, and then the assignees being so clothed, the claim should be limited to 91,879*l.*; or, if it is more convenient, that sum might be set apart. The principal difficulty is to know the right mode of trying this question, protecting it from all the consequences which might arise if we either allowed or rejected this proof. The mode, however, on which it strikes me this claim ought to be dealt with is, not to leave it as a claim, but to reserve it for further directions. Without our imposing any terms on the parties, you will arrange the best mode to put the assignees in the most complete situation possible to try the question in Scotland; and then, in the meantime, the claim can be reserved for further directions.

The petition, therefore, stood over for further directions to abide the event of the Crown's proceedings in Scotland; and the order, it was agreed, should be arranged out of Court as to the manner in which that suit should be prosecuted.

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ABATEMENT.

Defendant, after putting in his answer, became bankrupt. Plaintiff, before assignees were brought before Court, obtained an order to refer the answer for scandal and impertinence : —Held, that order was regular. *Booth v. Smith*, 5 Sim. 639.

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PARTNERS.

An uncertificated bankrupt cannot petition that his assignees may be ordered to account, without alleging that his estate will produce a surplus, after paying 20s. in the pound. *Ex parte and re Ryley*, 1834. 4 *Dea. & Chit.* 50.

After there has been a change

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of assignees, and a long period of time has elapsed, the Court will not refer the accounts of the assignees for examination, for the purpose of charging the new assignees with the default of the former assignees. *Ex parte Richards, re Trevor*, 1835. 4 Dea. & Chit. 183; S. C. 2 M. & A. 75.

Although the petitioning creditor is not entitled to an order on the assignees to pay the amount of his costs before they have received money under the fiat, he is nevertheless entitled to an inquiry, whether any assets have been received by the assignees. *Ex parte Abram, re Dunna*, 1835. 4 Dea. & Chit. 401.

ACCOUNT SETTLED AND STATED.

Commissioners cannot open audited accounts of assignees without permission of Court of Review. *Ex parte Benham, re Bramwell*, 2 M. & A. 272.

An entry in a bankrupt's examination of a certain sum being due to A., is evidence of an account stated between them, and is a sufficient acknowledgment to take the case out of the statute of limitations. But in an action by an attorney for business done, for which no signed bills had been delivered in pursuance of the statute, an admission by the defendant, in an examination before the Commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is

not sufficient evidence to support a count upon an account stated.

The plaintiff, after being non-suited, took out a fiat in bankruptcy against the defendant:—The Court refused to allow the proceedings to be stayed without costs, on a suggestion that the case was within the 6 G. 4, c. 16, s. 59. *Eicke v. Nokes*, 4 M. & Scott, 585; S. C. 1 Moody, 359.

ACQUIESCENCE.

See also CONSENT.

After repeated acts of acquiescence of the bankrupt in the validity of a commission, and the dismissal of a former petition by him to the Lord Chancellor to supersede it, the Court will restrain him from bringing actions against his assignees. *Ex parte White, re Britten*, 1835. 4 Dea. & Chit. 279; S. C. 2 M. & A. 104.

Upon very slight circumstances of acquiescence, and where the bankrupt has lain by for 22 years without taking any active steps to upset the commission, this Court will, upon petition of assignees and a purchaser under the commission, grant an injunction to restrain actions commenced by the bankrupt against purchasers under the commission. *Ex parte Davy, re Chambers*, 1834. 4 Dea. & Chit. 322; S. C. 1 M. & A. 283.

In 1780 A. and B. were partners as army agents, having been in the habit of receiving money from

the government for the pay of certain regiments. In that year *A.* retires, and *B.* and *C.* carry on the business as before, but without coming to any account with the Crown, and without any account whatever being taken of the liabilities of the firm of *A.* and *B.* at the time of *A.*'s retiring. In 1783, *B.* & *C.* are required by the government to render the account of monies issued for the several regiments during the period of the existence of the firm of *A.* and *B.* and of *B.* and *C.*, which they do without any break appearing in them at 1780, when *A.* retired. But the accounts rendered do not state any debtor and creditor account as between the respective firms and the Crown, but show simply the sums issued in respect of each regiment, and how they have been applied. On the formation of the firm of *B.* and *C.*, the old ledgers are used; there was no agreement to take to the liabilities of *A.* and *B.*, and every thing is carried on in the same manner as before till 1783, when the 23 *Geo. 3. c. 30.* was passed, which directs that an estimate is to be thenceforth prepared of the amount which will be required for the purposes of the army; that the amount is to be paid from time to time into the bank; that the paymaster of the forces is to communicate to the Secretary at War the sums that will be required for the purposes of the different regiments; that the agents of the different regiments are to

communicate to the Secretary at War the sums that will be required for the different regiments, and an issue is then made to the agent for the particular purposes of those regiments, and annual accounts were required to be rendered by the several agents. Upon this footing matters are carried on till 1804, when *B.* and *C.* became bankrupts, and a balance of 150,000*l.* is found due to the Crown; and in 1820, and not before, it is found that 91,000*l.*, part of the 150,000*l.* was due at the time of the retirement of *A.* *Seem*, under these circumstances, that *B.* and *C.* could not be presumed to have adopted the debt of *A.* and *B.*, and that the government could not be presumed to have assented thereto had such adoption existed; and, consequently, that the government had no right to prove the entire sum of 150,000*l.* against *B.* and *C.*'s estate. (*Cross, J. dissent.*) But it also appearing that the assignees had, by proceedings in the Court of Session in Scotland, treated the 91,000*l.* as due from their estate, and the government having, on the other hand, sued the representatives of *A.* in Scotland (subsequently to the discovery of the balance being due) so as to charge *A.* alone as the debtor, a claim was permitted to be entered till the result of the Crown's proceedings, which were still pending, against the representatives of *A.* was ascertained. *Ex parte Sandham*, 4 *Dea. & Chit.* 818.

Clayton's Case discussed. *Id.*

ACTION.

Where a plaintiff becomes bankrupt before the trial of a cause, the defendant cannot apply for security for costs till he has ascertained that the assignees have resolved to proceed with the action.

A plaintiff declared in time to go to trial at the sittings in Michaelmas term, had not two orders for time to plead been obtained. As the "usual terms" were imposed, viz. inter alia, the accepting short notice of trial, the plaintiff might still have gone to trial at the sittings after that term, but did not. On the 10th January he appeared in the Gazette as a bankrupt, and on the 29th the issue was delivered:—Held, that an application for security for costs from the assignees, made on the 31st January, was in time. *Walkinshaw v. Marshall*, 4 Tyr. 993.

In an action by a bankrupt against his assignees to try the validity of his commission:—Held, that the assignment having been lost before it had been entered of record pursuant to 6 Geo. 4. c. 16. s. 96. secondary evidence of its contents might be given. *Giles v. Smith*, 1 Crompt. Meeson & Roscoe, 462; S. C. 5 Tyr. 15.

In an action by assignees of a bankrupt, admissions of their title as assignees by the defendant in letters addressed to the solicitor to the commission and to one of the assignees, are *prima facie* evidence of title, so as to dispense with strict proof, though

there is a plea denying the title of the plaintiffs as assignees, and notice to dispute has been given. *Inglis v. Spence*, 1 Crompt. Meeson & Roscoe, 432; S. C. 5 Tyrw. 8.

In an action brought by the syndics of a French bankrupt upon an arbitral sentence and ordonnance, whereby the defendant was adjudged to pay the bankrupt a sum of money: Held, that two out of three syndics of a French bankrupt may sue without naming the third, or stating that the Juge Commissaire has authorized the suit, such appearing to be the rule in France. *Quære*, whether the objection to the non-joinder of the third syndic could be taken on the plea of *nil debet*? *Alison v. Furnival*, 1 Crompt. Meeson & Roscoe, 277; S. C. 4 Tyrw. 751.

If in trover by the assignee of a bankrupt, the plaintiff's title as assignee be put in issue, the fiat of bankruptcy inrolled, the certificate of the appointment of the plaintiff as assignee inrolled, and the appointment itself also inrolled, are sufficient proof that the plaintiff is assignee. *Scott v. Thomas*, 6 C. & P. 611.

Depositions of deceased witnesses taken before Commissioners of bankrupt on the opening of a commission, and subsequently inrolled by the assignees afterwards, pursuant to the 6 G. 4. c. 16. s. 96., are not admissible in evidence against the assignees acting under the commission, in an action brought by the bankrupt against such assignees, for the pur-

pose of disputing the validity of the commission. *Chambers v. Bernasconi*, 1 Crom. M. & R. 347.

The declarations of the petitioning creditor (since dead) made after the commission, are not evidence against the assignees, in an issue to try whether the commission was concerted between the petitioning creditor, the bankrupt, and the attorney. *Harwood v. Keys*, 1 Moody & Rob. 204.

In trespass, defendants, after alleging that *M.* had been declared a bankrupt, and that they had been appointed his assignees, justified taking goods as belonging to them in their capacity of assignees: plaintiff replied that the goods belonged to him and not to defendants:—Held, that upon this issue it was not incumbent on defendants to give formal proof of *M.*'s bankruptcy and their appointment as assignees. *Jones v. Brown*, 1 Bing. N. C. 484; *S. C.* 1 Scott, 453.

Where a new petitioning creditor's debt has been substituted under the stat. 6 G. 4. c. 16. s. 18. it is sufficient to prove the petition to the Chancellor, for the substitution of the new debt—the Chancellor's order referring the sufficiency of the debt, &c. to the Commissioner—and the finding of the Commissioner thereon. It is not necessary to produce the Chancellor's order confirming such finding. *Batchelor v. Vyse*, 1 Moody & Rob. 331.

ACT OF BANKRUPTCY.

On a deposit of a policy of assurance by way of equitable mortgage, the onus does not lie on the mortgagee to show that notice of the deposit was given to the office before the act of bankruptcy, but with the assignees, to show that it was not. *Ex parte* and *re Stevens*, 1834. 4 Dea. & Chit. 117.

The bare neglect to keep an appointment to meet a creditor, does not amount to an act of bankruptcy. *Ex parte* and *re Lavender*, 1834. 4 Dea. & Chit. 484.

A bankrupt, pending a negotiation for the loan of money, is arrested in the country and discharged on bail. He at the time promises to meet the creditor and his solicitor on the following day; however, he goes to London, in order to procure part of the loan, and therewith to pay the creditor the debt instead of giving security. He writes to the solicitor stating the fact and its object, and promises to return in a day or two and pay the debt. He is, however, detained longer in London, *bond fide*, upon the negotiation:—Held, that evidence of the intent to delay his creditor was rebutted. *Ex parte* and *re Lavender*, 1834. 4 Dea. & Chit. 484.

Single act of buying and selling by farmer, with evidence of intent to continue, sufficient act of bankruptcy. *Ex parte* and *re Lavender*, 1834. 4 Dea. & Chit. 487.

Quære. Whether an act of

bankruptcy, by denial of the debtor to the cestui que trust, is good to support a fiat, the trustee being the proper party to demand and receive the debt? *Per Sir G. Rose, Ex parte Gray*, 4 Dea. & Chit. 778; S. C. 2 M. & A. 283.

New fiat issued on petition of same petitioning creditor before time for opening had expired, he having been unable to prove act of bankruptcy before, but one having been since committed. *Ex parte Lewellyn, re Williams*, 2 M. & A. 298.

A trader and soap manufacturer being indebted to his bankers in a sum of 13,147*l.* assigned to them his leasehold property, with all his engines, machines, &c. stock in trade and effects upon the same, in order to secure as well money then due, as money to be thereafter due from him to them on the balance of his account. The bankers had a power to sell the whole property assigned, including a policy of insurance on the life of the trader; but he was at liberty to remain in possession till default made in payment. At the time of executing the assignment, the trader was possessed of other property worth 13,000*l.* which was not covered by it. The trader having become bankrupt, his assignees sued to recover the property assigned; but the jury found that the deed was executed, not in contemplation of bankruptcy, but with intent to give the defendants the means of taking possession of the property in the

event of bankruptcy:—Held, that the assignment was good, and did not amount to an act of bankruptcy. *Carr v. Burdiss*, 5 Tyr. 136; S. C. 1 Crom. M. & R. 443, 782.

Upon an issue whether or not a trader had committed an act of bankruptcy on or before the 5th March, letters written by him on the 16th January to the holders of the bills to become due in February, praying for time, were held admissible for the purpose of showing him to be in embarrassed circumstances, and as tending to give a colour to his absentsing himself from his home and business from the 16th February to the 9th March. *Smith v. Cramer*, 1 Scott, 541; S. C. 1 Bing. N. C. 585.

Personal property may be transferred for a sufficient consideration, without writing, if the possession be also transferred; and a debtor may prefer one creditor to another, if the debtor be not a trader; but if he be a trader he cannot prefer one creditor to another, unless he be pressed. A fraudulent delivery of goods by a trader will be of itself an act of bankruptcy. A delivery of goods to one to whom no debt was due would be such a fraudulent delivery; and the delivery would likewise be fraudulent, though a debt was due, if the transfer of the goods was made voluntarily, and in contemplation of bankruptcy. *Scott v. Thomas*, 6 C. & P. 611.

Where a trader assigned by deed all his property in trust for the bene-

fit of his creditors:—Held, that it was an act of bankruptcy under 6 G. 4. c. 16. s. 3., although in so doing he did not intend to defeat or delay his creditors, as, that being the necessary consequence of the assignment, he must in law be taken to have intended it. *Stewart v. Moody*, 1 Crom. M. & R. 777.

The declarations of a trader made shortly after an absence, are not admissible to prove such absence an act of bankruptcy. *Semble*. That a breach of an appointment by a trader to call at his creditor's house to pay a debt, is not an act of bankruptcy. *Lees v. Marton*, 1 Moody & Rob. 210.

ADJOURNMENT, SINE DIE.

Where the bankrupt petitions for a supersedeas, with the consent of creditors, and it appears that the Commissioners have adjourned his last examination *sine die*, the Court will not supersede without knowing the reason of such adjournment. *Ex parte Gudge re Gudge*, 1834. 4 Dea. & Chit. 388; S. C. 1 M. & A. 341.

ADJUDICATION.

See also REVERSING ADJUDICATION.

Upon *prima facie* case, *viâ voce* examination ordered and advertisement of adjudication postponed. *Ex parte* and *re Lavender*, 1834. 4 Dea. & Chit. 486.

Commissioners recommended to

hear counsel against adjudication. *Re Walker*, 2 M. & A. 267.

ADMISSIONS.

Although no evidence of trading, on proceedings fiat will not be superseded if bankrupt admitted to petitioning creditor that he was a trader. *Ex parte*, and *re Bailey*, 2 M. & A. 86.

ADVANCING AND ADJOURNING PETITION.

See PETITION ADVANCING, &c.

AFFIDAVITS,

Generally.

Affidavits referred for scandal on motion of course. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Chit. 217.

Motion to confirm report as to scandal in affidavits, is a motion of course. *Ex parte Hetherington, re Glossop*, 1834. 4 Dea. & Chit. 223.

A cross-petition by the bankrupt for allowance of the certificate, will not be advanced on motion of course, pending the reference for scandal, of affidavits filed in answer to the petition to stay the certificate, on the ground that the latter petition was improperly served. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Chit. 217.

Service of petition to stay certificate, not properly supported where affidavit merely states inability to serve bankrupt personally, but that bankrupt's solicitor had acknow-

ledged bankrupt to be fully aware of petition and its nature. *Ex parte Levy, re Glossop*, 1835. 4 Dea. & Chit. 224.

When an order is made on the hearing of a petition, that a party shall pay the costs, this includes the costs of an affidavit filed by the other party, although it was not read on the hearing of the petition. *Ex parte Sidebotham, re Barrington*, 1835. 4 Dea. & Chit. 141; *S. C. nom. Ex parte and re Barrington*, 2 M. & A. 72.

Swearing.

It is no objection that an affidavit is sworn before a Master in Chancery. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Chit. 221.

Form of.

Affidavit to support deposition of proof on bill, should state consideration. *Ex parte Maberly, re Young*, 2 M. & A. 23.

Of Service.

A party is not entitled to an order on his petition, on the default of the respondent's appearance, if he is not prepared with an affidavit of the service of the petition, notwithstanding the respondent has given an undertaking to appear. *Ex parte Kirkaldy, re Holt*, 1834. 4 Dea. & Chit. 52.

Of Proof.

If defective affidavit be pro-

duced, Commissioner should not reject, but only adjourn proof. *Ex parte Maberly, re Young*, 2 M. & A. 23.

AGREEMENT.

See also ASSIGNEES ELECTION TO TAKE TO AGREEMENT.

A. deposits with *B.*, as a security for the re-payment of a loan of money, the attested copy of the lease of a coal mine granted to *A.* and four other persons, as tenants in common. The mine was worked according to the stipulations of certain articles of partnership, which contained a proviso that if any one partner wished to dispose of his share, the others should have a right of preemption:—Held, (*Sir J. Cross dissent.*) that the usual order could not be made for the sale of *A.*'s share in this property, as in the ordinary case of an equitable mortgage, it being necessary that the partnership accounts should first be taken, for the purpose of ascertaining *A.*'s share in the property, which this Court had no jurisdiction to do, the other partners not being before the Court. *Ex parte Broadbent, re Borron*, 1834. 4 Dea. & Chit. 3; *S. C.* 1 M. & A. 635.

A., *B.*, and *C.*, agree to dissolve their partnership, and that *A.* shall receive 550*l.* in discharge of his share in the concern, of which 50*l.* was agreed to be paid at the date of the agreement, and the remaining 500*l.* by five several bills payable at future

dates. Separate fiats are issued against *A.*, *B.*, and *C.*, and the stock and effects which originally belonged to the firm of the three, are taken possession of and sold by the assignee under the separate fiat against *B.*:—Held, that the agreement of the dissolution of the partnership was executed, and not executory; and that the joint creditors of *A.*, *B.*, and *C.*, had no lien on such stock and effects for the payment of the debts owing to them at the time of *A.*'s retiring from the partnership. *Ex parte Clarkson, re Fear*, 1834. 4 Dea. & Chit. 56; *S. C.* 2 M. & A. 4.

By the rules of an Insurance Company, no person, except a director, was permitted to hold more than two shares in his own name, but no rule prevented a person from being beneficially entitled to more than two shares by holding them in the name of another party. The petitioner, who was already the holder of two shares, having purchased two other shares, caused them to be entered in the name of the bankrupt in the company's books, with the knowledge of one of the directors and the actuary. The bankrupt signed a declaration of trust that he held the shares as trustee for the petitioner, but no notice of the trust was taken in the books of the company, and he continued to receive the dividends on the shares, accounting for them from time to time to the petitioner, up to the period of his bankruptcy, when the shares were still standing in his

name:—Held, that the shares did not pass to his assignees, as being in his order and disposition at the time of his bankruptcy. *Ex parte Watkins, re Kidder*, 1834. 4 Dea. & Chit. 87; *S. C.* 1 M. & A. 689.

The bankrupt having a contract with the Ordnance Board for the delivery of a certain quantity of candles, and being unable to complete the contract, applied to the petitioner to assist him, by delivering a part of the quantity contracted for, which the petitioner agreed to do, provided the candles were delivered in the petitioner's own name. The bankrupt undertakes to do this, makes out a bill of parcels in the petitioner's own name, and sends his own waggons for the purpose of delivering the candles at the Ordnance depôt. The official assignee, after the bankruptcy, receives from the Ordnance Board the price of the candles which had been furnished by the petitioner:—Held, that he was bound to refund it to the petitioner. *Ex parte Carlon, re Birks*, 1834. 4 Dea. & Chit. 120; *S. C.* 2 M. & A. 39.

By a clause in the deed of a banking company, it was stipulated that the company should have a lien on the shares of such proprietors as were customers and indebted to the bank, and that no share should be transferred without the consent of the directors; and an abstract of these provisions was indorsed on the certificate of the share held by each proprietor. The bankrupt at the time

of his bankruptcy, was the owner of thirty of these shares, and had in his possession the certificates of ownership thus indorsed, being then largely indebted to the bank for advances:—Held, that these shares did not pass to his assignee under the clause of reputed ownership in the Bankrupt Act, so as to defeat the lien of the bank, which had been provided for in the deed. *Ex parte Plant, re Butterworth*, 1835. 4 Dea. & Chit. 160.

ALLOWANCE.

See BANKRUPT'S ALLOWANCE.

AMENDMENT.

See also FIAT, AMENDMENT OF.

Fiat amended, by altering the description of one of the petitioning creditors, so as to make it agree with that in the docket papers. *Ex parte Jervis, re Elliott*, 1834. 4 Dea. & Chit. 27; S. C. 1 M. & A. 619.

The Court will not, on the application of the petitioning creditor, alter the date of the fiat to a later day, to give him more time to prove the act of bankruptcy. *Re Jacob*, 1835. 4 Dea. & Chit. 277; S. C. 2 M. & A. 102.

AMOUNT OF PROOF.

See PROOF, AMOUNT OF.

ANNUITY.

Annuity given by father on daughter's marriage, by a letter to the intended husband in these words, viz. "I promise you, until it is conveni-

ent to me to do something better for you, to allow to my daughter 100*l.* a year, which you can have as you require:"—Held, to be an annuity during the joint lives of the father and daughter; and though incapable of valuation and though no other evidence of the genuineness of the letter, held to be provable. *Sir J. Cross dissent.*, upon the ground that the facts required further investigation. *Ex parte Annandale, re Curtis*, 1834. 4 Dea. & Chit. 511.

The instalments of an annuity for the payment of which a bankrupt is surety only, and which he covenants to pay in case of the default of the grantor, are not, where they become due after his bankruptcy, provable under a fiat against the surety. *Thompson v. Thompson*, 2 Bing. N. C. 168.

ANNULLING FIAT.

See FIAT, ANNULING.

ANSWER.

Defendant, after putting in his answer, became bankrupt. Plaintiff, before assignees were brought before Court, obtained an order to refer the answer for scandal and impertinence:—Held, that order was regular. *Booth v. Smith*, 5 Sim. 639.

APPEAL.

Where the Commissioners expunged a proof, on the application of the assignees, and the creditor afterwards succeeded on a petition to have

it restored, the Court gave him the costs of the petition, as well as of the proceedings before the Commissioners; making it an exception to the general rule, that costs are not given against the decision of the Commissioners. *Ex parte Brooks, re Moore*, 1835. 4 Dea. & Chit. 209; S. C. 2 M. & A. 78.

APPEARANCE.

See UNDERTAKING TO APPEAR—
HEARING.

APPOINTMENT OF ASSIGNEES.

See ASSIGNEES, APPOINTMENT OF.

APPOINTMENT OF TRUSTEES.

See TRUSTEES, NEW APPOINTMENT.

APPROPRIATION, SPECIFIC.

The bankrupt shipped goods to *M. & F.* at New South Wales, and the petitioner accepted bills drawn by the bankrupt for the invoice price, upon the express agreement that the proceeds of the several consignments should be received by the petitioner, and be appropriated by him in discharge of such acceptances; and notice of this agreement was given to *M. & F.* Two bills which were remitted to England by *M. & F.* on account of the proceeds of some of the shipments made by the bankrupt, came to the hands of the assignees:—

Held, that the petitioner was entitled to the proceeds of these bills, as well as all the future proceeds that might come to the hands of the assignees, in respect of the shipments made by the bankrupt to *M. & F.*, to be applied in discharge of the petitioner's acceptances. *Ex parte Flower, re Cormie*, 1835. 4 Dea. & Chit. 449; S. C. 2 M. & A. 224.

M. & A., partners, were consignees of a West India estate, and in that character became creditors to the estate. By deed, long prior to the bankruptcy, the estate was conveyed to trustees, *M.* being one of them, on trust to apply the proceeds to certain purposes, one of which was to pay off the debt due to *M. & A.* *M. & A.* assign their debt to *S. & Co.* *M. & A.* become bankrupt; but, prior thereto, they receive ten hogsheads of sugar, which remain in the docks, earmarked in their name, at the time of the bankruptcy. Shortly after the bankruptcy 74 hogsheads arrive, consigned by the bill of lading to the bankrupts, which are received by the assignees, who also take the other ten hogsheads:—Held, that the sugars came to the hands of *M. & A.* clothed with trusts to pay the proceeds to *M.* as trustee, and were not in the reputed ownership of *M. & A.*, but must be applied to pay off the debt assigned to *S. & Co.*, and in discharge of the other trusts of the deed; *M.*, as trustee, being affected with notice to *M. & A.* of the assignment of their debt:—Held,

also, a case within the principle of *Ex parte Waring*, 14 Ves.; *Ex parte Smith, re Manning*, 1834. 4 Dea. & Chit. 579.

W. shipped at Leghorn twenty-three casks of oil, on account and by the order of *L.* at Liverpool, and transmitted to him a bill of lading. Before the arrival of the oil, *L.* indorsed the bill of lading, and deposited it with *H.*, who advanced money on it, having previously advanced money on other goods (the property of *L.*) deposited with him. On the arrival of the oil, *L.* having previously become bankrupt, and *W.* not having been paid for it, *W.*'s agents claimed it of the master of the ship; but the latter delivered it to *H.*, who afterwards sold the goods of *L.* as well as the oil of *W.* The net proceeds of the goods belonging to *L.* were sufficient to satisfy the debt due from *L.* to *H.* *H.* paid himself his debt, and deposited the net proceeds of *W.*'s oil with a third person, to abide the event of the award of an arbitrator to whom all disputes between *W.* and the assignees of *L.* were referred. The arbitrator having stated the above facts on his award for the opinion of this Court:—Held, that *W.*, the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of *L.*, because the property in and the right to the possession was then vested in *H.*, the indorsee of the bill of lading for value; and further, that *W.* had

not, by reason of such claim, any legal right to the possession of the goods after *H.*'s lien was satisfied: but that in a court of equity, such transfer to *H.* would be treated as a pledge or mortgage only, and therefore *W.*, by his attempted stoppage in transitu, acquired a right to the goods in equity, subject to *H.*'s lien against the assignees of *L.* Held, secondly, that *W.*, by means of his goods, had become surety to *H.* for *L.*'s debt, and had a clear equity to oblige *H.* to pay his debt out of *L.*'s own goods deposited with him in ease of such surety; and all the goods both of *W.* and *L.* having been sold, *W.* might insist on the proceeds of *L.*'s goods being appropriated to payment of the debt: and, therefore, that *W.* was entitled to have all the proceeds of the oil paid over to him. *Re the Arbitration between Westzinkus and Assignees of Lapage and Co.: and between Rogers and Co. and the same Assignees*, 5 Barn. & Adol. 817.

After *L.* a trader had committed a secret act of bankruptcy, *M. & Co.* his creditors, knowing him to be embarrassed, pressed him for payment. *L.* said he had no money, but that if they could get a customer for his goods, they should be paid. *M. & Co.* accordingly procured the defendant *A.*, a creditor of their own, to buy goods of *L.* No money passed from *A.* to *L.* or to *M. & Co.* but *A.* gave *M. & Co.* credit on account. This transaction was communicated

to *L.*, and a receipt was given him by *M. & Co.* signed by them, specifying it to be "by payment of defendant *A.* agreeably to his order, balancing their account with him." A fiat having issued against *L.*, his assignees sued *A.* in assumpsit for the price of the goods sold to him:—Held, first, that if the appropriation of the price to *M. & Co.* was parcel of the contract between *A.* and *L.*, and by its terms irrevocable, the action should have been trover; for by waiving the tort and affirming the contract, the assignees adopted it in all its parts, though a further question would arise whether the payment relied on by *A.* the defendant, as made in pursuance of the contract, was a payment protected by 6 *G.* 4. c. 16. s. 82. Secondly, that if the payment by *A.* the defendant to *M. & Co.* was not stipulated for in the original contract, but was merely directed afterwards by *L.*, and had not been acted on, that direction was revocable by him before his bankruptcy, or by his assignees after that event, and the plaintiffs were entitled to recover. *Bradbury v. Anderton*, 5 *Tyr.* 152; *S. C.* 1 *Crom. M. & R.* 486.

ARMY AGENT.

In 1780 *A.* and *B.* were partners as army agents, having been in the habit of receiving money from the government for the pay of certain regiments. In that year *A.* retires, and *B.* and *C.* carry on the

business as before, but without coming to any account with the Crown, and without any account whatever being taken of the liabilities of the firm of *A.* and *B.* at the time of *A.*'s retiring. In 1783, *B.* and *C.* are required by the government to render the account of monies issued for the several regiments during the period of the existence of the firm of *A.* and *B.* and of *B.* and *C.*, which they do without any break appearing in them at 1780, when *A.* retired. But the accounts rendered do not state any debtor and creditor account as between the respective firms and the Crown, but show simply the sums issued in respect of each regiment, and how they have been applied. On the formation of the firm of *B.* and *C.*, the old ledgers are used; there was no agreement to take to the liabilities of *A.* and *B.*, and every thing is carried on in the same manner as before till 1783, when the 23 *Geo.* 3. c. 30. was passed, which directs that an estimate is to be thenceforth prepared of the amount which will be required for the purposes of the army; that the amount is to be paid from time to time into the bank; that the paymaster of the forces is to communicate to the Secretary at War the sums that will be required for the purposes of the different regiments; that the agents of the different regiments are to communicate to the Secretary at War the sums that will be required for the different regiments, and an issue is

then made to the agent for the particular purposes of those regiments, and annual accounts were required to be rendered by the several agents. Upon this footing matters are carried on till 1804, when *B.* and *C.* became bankrupts, and a balance of 150,000*l.* is found due to the Crown; and in 1820, and not before, it is found that 91,000*l.*, part of the 150,000*l.* was due at the time of the retirement of *A.* *Scumble*, under these circumstances, that *B.* and *C.* could not be presumed to have adopted the debt of *A.* and *B.*, and that the government could not be presumed to have assented thereto had such adoption existed; and, consequently, that the government had no right to prove the entire sum of 150,000*l.* against *B.* and *C.*'s estate. (*Cross, J. dissent.*) But it also appearing that the assignees had, by proceedings in the Court of Session in Scotland, treated the 91,000*l.* as due from their estate, and the government having, on the other hand, sued the representatives of *A.* in Scotland (subsequently to the discovery of the balance being due) so as to charge *A.* alone as the debtor, a claim was permitted to be entered till the result of the Crown's proceedings, which were still pending, against the representatives of *A.* was ascertained. *Ex parte Sandham*, 4 Dea. & Chit. 818.

ASSETS IN BANKRUPTCY.

The bankrupt having a contract

with the Ordnance Board for the delivery of a certain quantity of candles, and being unable to complete the contract, applies to the petitioner to assist him, by delivering a part of the quantity contracted for; which the petitioner agreed to do, provided the candles were delivered in the petitioner's own name. The bankrupt undertakes to do this, makes out a bill of parcels in the petitioner's own name, and sends his own waggons for the purpose of delivering the candles at the Ordnance depôt. The official assignee, after the bankruptcy, receives from the Ordnance Board the price of the candles which had been furnished by the petitioner. Held, that he was bound to refund it to the petitioner. *Ex parte Carlon, re Birks*, 1834. 4 Dea. & Ch. 120; S. C. 2 M. & A. 39.

The interest made by the investment of unclaimed dividends, does not belong to the general estate, but is divisible among the creditors claiming the hitherto unclaimed dividends. *Ex parte Renshaw, re Wild*, 1834. 4 Dea. & Ch. 483.

By will the father-in-law of the bankrupt gave 4000*l.* in trust for his daughter for life, to her separate use, then to the bankrupt for life, and then to the issue of the marriage. The will, reciting that the bankrupt was indebted to the testator 6000*l.* on bond, declared that so much of the debt on the bond as remaining unpaid in the testator's life-time should go in redemption and satisfaction of the

above bequest of 4000*l.* Prior to the bankruptcy, and subsequently, by means of dividends from his estate, 1069*l.*, part of the 6000*l.* bond debt, was paid off and invested in the funds. On petition of the assignees, claiming to be entitled to the interest of the 1069*l.*, the wife being dead, held (Sir *J. Cross dissent.*) that, until the 4000*l.* should be made up, the 1069*l.* should accumulate; after which, the assignees were declared entitled to the interest for the bankrupt's life. *Ex parte Young, re Prior*, 1835. 4 Dea. & Ch. 645.

There is jurisdiction to reach any part of the bankrupt's estate in the hands of the solicitor to the fiat. *Ex parte Benham, re Bramwell*, 2 M. & A. 280.

ASSIGNEES,

Generally.

A creditor, who becomes bankrupt after proving his debt, may nevertheless petition to stay the first bankrupt's certificate, if the assignees of the creditor do not interfere. *Ex parte Tayler, re Percival*, 1834. 4 Dea. & Ch. 125; *S. C.* 2 M. & A. 36.

An injunction will be granted to restrain assignees from proceeding in an action, where they have not an equitable as well as a legal right. *Ex parte Booth, re Kew*, 1835. 4 Dea. & Ch. 211; *S. C.* 2 M. & A. 93.

A notice to produce the proceedings must be served on the assignees, not on the bankrupt. *Ex parte and re Daly*, 1834. 4 Dea. & Ch. 364.

Before an assignee applies for leave to bid as the sale of the bankrupt's property, he must call a meeting of the creditors, for the purpose of assenting to or dissenting from such proposed bidding. *Ex parte Molineux, re Blight*, 1835. 4 Dea. & Ch. 460; *S. C.* 2 M. & A. 245.

If the Commissioners certify that a consolidation will be beneficial, the assignees need not be served. *Ex parte Smith, re Shaw*, 2 M. & A. 60.

On petition to annul on consent, under 6 *Geo.* 4. c. 16, s. 133, 134, the assignees must be served. *Ex parte and re Race*, 2 M. & A. 242.

In trespass, defendants, after alleging that *M.* had been declared a bankrupt, and that they had been appointed his assignees, justified taking goods as belonging to them in their capacity of assignees: plaintiff replied that the goods belonged to him and not to defendants:—Held, that upon this issue it was not incumbent on defendants to give formal proof of *M.*'s bankruptcy and their appointment as assignees. *Jones v. Brown*, 1 Bing. N. C. 484; *S. C.* 1 Scott, 453.

Where a new petitioning creditor's debt has been substituted under the stat. 6 *Geo.* 4. c. 16. s. 18, it is sufficient to prove the petition to the Chancellor, for the substitution of the new debt—the Chancellor's order referring the sufficiency of the debt, &c. to the Commissioner—and the finding of the Commissioner thereon. It is not necessary to pro-

duce the Chancellor's order confirming such finding. *Batchelor v. Vyse*, 1 Moody & Rob. 331.

The declarations of the petitioning creditor (since dead) made after the commission, are not evidence against the assignees, in an issue to try whether the commission was concerted between the petitioning creditor, the bankrupt, and the attorney. *Harwood v. Keys*, 1 Moody & Rob. 204.

Depositions of deceased witnesses taken before Commissioners of bankrupt on the opening of a commission, and subsequently inrolled by the assignees afterwards, pursuant to the 6 Geo. 4. c. 16. s. 96., are not admissible in evidence against the assignees acting under the commission, in an action brought by the bankrupt against such assignees, for the purpose of disputing the validity of the commission. *Chambers v. Bernasconi*, 1 Crom. M. & R. 347.

In trover by a bankrupt against his assignees to try the validity of the commission:—Held, that secondary evidence of the assignment might be given after proving that it was lost before it was entered of record, as directed by 6 Geo. 4. c. 16. s. 96., and 2 & 3 Will. 4. c. 114. s. 7. *Seemle*, proof of the plaintiff's acquiescence in the defendant's acts as assignee, and dealing with him in that character, would render proof of the assignment unnecessary. *Giles v. Smith*, 5 Tyr. 15; S. C. 1 Crom. M. & R. 462.

In an action by assignees of a

bankrupt for goods sold and delivered by the bankrupt before his bankruptcy, the plea denied their title as assignees, and a notice to dispute the trading &c. was given, pursuant to 6 Geo. 4. c. 16. s. 90. Letters from the defendant to one of the assignees, and to the solicitor to the commission, deprecating proceedings against him, are *prima facie* evidence in admission of the plaintiff's title to sue as assignees, without the regular proof of the bankruptcy. *Inglis v. Spence*, 5 Tyr. 8; S. C. 1 Crom. M. & R. 432.

The Court allowed the assignees of a bankrupt to plead, in covenant on a lease, 1st, that the lessee's interest did not pass to them. 2ndly, that they renounced the term in time to be discharged from the performance of covenants. *Thompson v. Bradbury*, 1 Bing. N. C. 326; S. C. 1 Scott, 278.

Accounts.

Assignees are entitled to the expenses of journeys solely and properly undertaken for the benefit of the estate. *Ex parte Joyner, re Sharp*, 2 M. & A. 1; S. P. *Ex parte Lovegrove*, id. 4.

Commissioners cannot open audited accounts of assignees without permission from Court of Review. *Ex parte Benham, re Bramwell*, 2 M. & A. 272.

Appointment.

If in trover by the assignee of a bankrupt, the plaintiff's title as as-

signee be put in issue, the fiat of bankruptcy inrolled, the certificate of the appointment of the plaintiff as assignee inrolled, and the appointment itself also inrolled, are sufficient proof that the plaintiff is assignee. *Scott v. Thomas*, 6 C. & P. 611.

Duties, Rights, Powers, and Liabilities.

The Court will not make any order, on the application of the assignees, as to the management for the sale of the bankrupt's property; they must act on their own responsibility. *Ex parte Belcher, re Maberly*, 1834. 4 Dea. & Chit. 1; S. C. 1 M. & A. 478.

An order made by the Court, sanctioning a pecuniary arrangement effected by the assignees. *Ex parte Prater, re Hurley*, 1835. 4 Dea. & Chit. 214; S. C. 2 M. & A. 364.

A reference ordered to the Commissioner to inquire whether an arrangement, in regard to a portion of the bankrupt's property, which was approved of at a meeting of the creditors, would be beneficial to the estate. *Ex parte Kirby, re Pottinger*, 1835. 4 Dea. & Chit. 400; S. C. 2 M. & A. 142.

The Court will order a reference to inquire if it is proper to carry on the bankrupt's business, although some of the creditors dissent, but they will have liberty to prosecute the order. *Ex parte Mendel*, 4 Dea. & Chit. 725.

Reference to Registrar to see if arrangement out of Court by assign-

nees was proper. *In re Hyslop*, 4 Dea. & Chit. 809; S. C. 2 M. & A. 289.

A bankrupt having a mortgage term, deposits the mortgage deed with a party by way of equitable mortgage, and afterwards purchases the equity of redemption:—Held, that the whole of the bankrupt's interest in the property must be sold, and his assignees join in the conveyance to the purchaser. *Ex parte Tuffnell, re Watts*, 1834. 4 Dea. & Chit. 29; S. C. 2 M. & A. 620.

On a deposit of a policy of assurance by way of equitable mortgage, the onus does not lie on the mortgagee, to show that notice of the deposit was given to the office before the act of bankruptcy,—but with the assignees, to show that it was not. *Ex parte and re Stetens*, 1834. 4 Dea. & Chit. 117.

After there has been a change of assignees, and a long period of time has elapsed, the Court will not refer the accounts of the assignees for examination, for the purpose of charging the new assignees with the default of the former assignees. *Ex parte Richards, re Trevor*, 1835. 4 Dea. & Chit. 183; S. C. 2 M. & A. 75.

The majority of the assignees have a clear right to the custody of the proceedings, unless gross misconduct be shown on a cross petition for their removal, or an injunction. *Ex parte Holford, re Tate*, 1834. 4 Dea. & Ch. 271; S. C. 2 M. & A. 52.

Although the petitioning creditor is not entitled to an order on the assignees to pay the amount of his costs, before they have received money under the fiat, he is nevertheless entitled to an inquiry, whether any assets have been received by the assignees. *Ex parte Abram, re Dunna*, 1835. 4 Dea. & Chit. 401.

An order of the Lord Chancellor made in a suit brought by the assignees, was, on their application, ordered to be registered in the Court of Bankruptcy. *Ex parte Williams, re Wienholt*, 1834. 4 Dea. & Chit. 110; S. C. 1 M. & A. 689.

A. and *B.* have separate banking establishments in Scotland, where it is the custom of the different bankers to exchange the notes they hold of each other at stated periods; and *A.* and *B.* were accustomed to make such mutual exchanges accordingly. *B.* becomes bankrupt, when his agent, who conducted the business in Scotland, had in his possession notes of *A.*'s bank to the amount of 230*l.*, while *A.* had notes of *B.* to the amount of 764*l.* *B.*'s agent refuses to exchange the notes for 230*l.*, claiming himself a lien on them; and *B.*'s assignees allow the agent to retain these notes in satisfaction of such lien:—Held, that *A.* was entitled to recover the value of the notes from the assignees of *B.* *Ex parte The National Bank of Scotland, re Mabery*, 1834. 4 Dea. & Chit. 32; S. C. 1 M. & A. 644.

It was deposed, that two out of

three provisional syndics may, by the law of France, sue to recover debts due to the bankrupt, and without the previous authority of the Juge Commissaire:—Held, that they may so sue in this country, unless the French law be shown to the contrary:—Held also, that the act of the two syndics sufficiently implied the absence or want of consent of the third, without showing his absence or want of consent. The declaration averred, that a party, a Frenchman, was a bankrupt. The evidence was, that he was only “en etat de faillite” or insolvent:—Held no variance, as the English “bankrupt” does not appear identical with the French “banqueroute.” *Alizon v. Furnival*, 4 Tyr. 751. S. C. 1 Crom. M. & R. 277.

An order of dividend found that a certain balance was in the hands of one of the assignees, and directed that assignee to divide the same among the creditors:—Held, that the other assignee, having never interfered with the control and application of the trust fund, was not liable to the creditors for the payment of the dividend. *Ex parte Dawson, re Finden*, 1834. 4 Dea. & Chit. 130; S. C. 2 M. & A. 94.

Assignees, on the representation of the solicitor to the commission that he is authorized to receive it as agent, pay over a dividend to such solicitor. It turns out, he had no such authority. Upon petition of creditor for payment to him of the dividend, charging that no authority

was given to that solicitor:—Held, that being solicitor to the commission he might be made respondent as well as the assignees, and that a joint order might be made against them all for its payment. On dividend being withheld, assignees ordered to pay it with five per cent. interest from time of application to them for payment. *Ex parte Story, re Johnson*, 1834. 4 Dea. & Chit. 504.

B. was agent for *M.* a banker. 450*l.* was sent by petitioner to *B.* as agent to retire a note of petitioners, which was not done, as *M.* became bankrupt. *B.* having a claim against *M.*, the assignees allowed him to retain 2000*l.* including, as was assumed, the 450*l.*:—Held, petitioner was entitled to recover the 450*l.* from the assignees. *Ex parte Simpson, re Maberly*, 2 M. & A. 292.

A bill of exchange for a portion of his debt, given by a bankrupt, after commission and before certificate, to his assignee, who was also petitioning creditor, and had proved for the residue of his debt:—Held, void in the hands of the assignee. *Rose v. Main*, 1 Bing. N. C. 357. S. C. 1 Scott, 127.

A., as assignee of *B.*, a bankrupt, gave an undertaking to *C.*, who was the mortgagee of one farm, and was under a contract to purchase another farm, both the property of the bankrupt, and who had a distress upon the mortgaged premises, that if the distress were withdrawn he would pay to *C.* the ar-

rears then due in respect of the mortgage, out of the effects on the premises. *C.* withdrew the distress accordingly, and afterwards the bankruptcy was annulled before *A.* had obtained possession of any part of the bankrupt's effects; whereupon *C.* brought an action on the undertaking, and recovered judgment against *A.* personally:—Held, on a bill filed by *A.* against *C.*, to which *B.* was no party, that *A.* could have no relief in equity against the judgment at law; and that he was not entitled, as against *C.*, to claim repayment of the sum thereby recovered out of the price which *C.* had contracted to pay for the other farm. *Pell v. Stephens*, 2 M. & K. 334.

Where a plaintiff becomes bankrupt before the trial of a cause, the defendant cannot apply for security for costs till he has ascertained that the assignees have resolved to proceed with the action. A plaintiff declared in time to go to trial at the sittings in Michaelmas term, had not two orders for time to plead been obtained. As the "usual terms" were imposed, viz. inter alia, the accepting short notice of trial, the plaintiff might still have gone to trial at the sittings after that term, but did not. On the 10th January he appeared in the Gazette as a bankrupt, and on the 29th the issue was delivered:—Held, that an application for security for costs from the assignees, made on the 31st January, was in time. *Walkinshaw v. Marshall*, 4 Tyr. 993.

Removal and Discharge.

An assignee, who has been guilty of misconduct, applies to be discharged, on payment of costs. The Court refused to act on the suggestion of the respondents, that the nature of his misconduct should be stated in the order for his removal; but directed that the order should be without prejudice to any future application against him. *Ex parte Angle, re Smith*, 1834. 4 Dea. & Chit. 118; S. C. 2 M. & A. 38.

An order of dividend found that a certain balance was in the hands of one of the assignees, and directed that assignee to divide the same among the creditors:—Held, that the other assignee, having never interfered with the control and application of the trust fund, was not liable to the creditors for the payment of the dividend. *Ex parte Dawson, re Finden*, 1834. 4 Dea. & Chit. 130; S. C. 2 M. & A. 94.

After there has been a change of assignees, and a long period of time has elapsed, the Court will not refer the accounts of the assignees for examination, for the purpose of charging the new assignees with the default of the former assignees. *Ex parte Richards, re Tretor*, 1835. 4 Dea. & Chit. 183; S. C. 2 M. & A. 75.

Under a commission prior to the 1 & 2 Will. 4. c. 56. where an assignee is removed since the act, it is not necessary that there should be a new assignment, or that the prior as-

signment should be vacated. *Smith v. De Tastet*, 1834. 4 Dea. & Chit. 360; S. C. 1 M. & A. 370.

Trustees under deed of trust to manage property for benefit of creditors, to protect the trust, issue a fiat against the debtor, and thereby prevent creditors dissenting from the trust deed from issuing an adverse fiat. The trustees continue to manage the property under the trust deed, and do not farther prosecute the fiat than by getting themselves appointed assignees. Upon petition of the adverse creditors to annul that fiat and issue an effective one, held, that without reference to their conduct, the trustees must be removed from the office of assignees in order to take the accounts against them as trustees. *Ex parte Mendel*, 4 Dea. & Chit. 725.

Election to take or reject Agreement.

Service of order on assignee to elect to take or reject an agreement, substituted, on affidavit of his purposely keeping out of the way. *Sem-ble*, that service, substituted by order, is tantamount to personal service *eo nomine*. *Ex parte Blandy, re Foster*, 1834. 4 Dea. & Chit. 518.

20l. per cent. Clause.

Commissioners cannot charge both assignees with 20l. per cent. where only one had the money, unless he finds the other "knowingly" permitted it. *Ex parte Benham, re Bramwell*, 2 M. & A. 272.

ASSIGNOR AND ASSIGNEE.

Where a party purchases of a creditor all his right to the dividends and interest on his proof, *semble*, that such party cannot proceed against the assignees by petition for an order to pay to him the dividends on the proof, but must be left to the ordinary means of enforcing the contract by action at law, or suit in equity. *Ex parte Richards, re Trevor*, 1835. 4 Dea. & Ch. 190.

W. shipped at Leghorn twenty-three casks of oil, on account and by the order of *L.* at Liverpool, and transmitted to him a bill of lading. Before the arrival of the oil, *L.* indorsed the bill of lading, and deposited it with *H.*, who advanced money on it, having previously advanced money on other goods (the property of *L.*) deposited with him. On the arrival of the oil, *L.* having previously become bankrupt, and *W.* not having been paid for it, *W.*'s agents claimed it of the master of the ship; but the latter delivered it to *H.*, who afterwards sold the goods of *L.* as well as the oil of *W.* The net proceeds of the goods belonging to *L.* were sufficient to satisfy the debt due from *L.* to *H.* *H.* paid himself his debt, and deposited the net proceeds of *W.*'s oil with a third person, to abide the event of the award of an arbitrator to whom all disputes between *W.* and the assignees of *L.* were referred. The arbitrator having stated the above facts on his award for the opinion of this Court:—Held, that

W., the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of *L.*, because the property in and the right to the possession was then vested in *H.*, the indorsee of the bill of lading for value; and further, that *W.* had not, by reason of such claim, any legal right to the possession of the goods after *H.*'s lien was satisfied: but that in a court of equity, such transfer to *H.* would be treated as a pledge or mortgage only, and therefore *W.*, by his attempted stoppage in transitu, acquired a right to the goods in equity, subject to *H.*'s lien against the assignees of *L.*:—Held, secondly, that *W.*, by means of his goods, had become surety to *H.* for *L.*'s debt, and had a clear equity to oblige *H.* to pay his debt out of *L.*'s own goods deposited with him in ease of such surety; and all the goods both of *W.* and *L.* having been sold, *W.* might insist on the proceeds of *L.*'s goods being appropriated to payment of the debt: and, therefore, that *W.* was entitled to have all the proceeds of the oil paid over to him. *Re the Arbitration between Westzinthus and Assignees of Lapage and Co.: and between Rogers and Co. and the same Assignees*, 5 Barn. & Adol. 817.

ASSIGNMENT, GENERAL.

Validity of.

A bankrupt deposits with the petitioner, by way of equitable mortgage, an assignment, which had been

made to the bankrupt, of a reversionary interest under a will; no notice of the assignment having been given to the executors either by the bankrupt or by the petitioner:—Held, that the property was not within the order and disposition of the bankrupt as reputed owner. *Ex parte Newton, re Goren*, 1834. 4 Dea. & Chit. 138; S. C. 2 M. & A. 51.

On a deposit of a policy of assurance by way of equitable mortgage, the onus does not lie 'on the mortgagee, to show that notice of the deposit was given to the office before the act of bankruptcy, but with the assignees, to show that it was not. *Ex parte and re Stevens*, 1834. 4 Dea. & Chit. 117.

A party, to whom the bankrupt had assigned a policy of assurance, sends an agent to the office for the purpose of paying the annual premium, who in course of conversation with one of the clerks in the office, tells him of the policy having been so assigned:—Held, that this was not sufficient notice to the insurance office. *Ex parte Carbis, re Croggon*, 1834. 4 Dea. & Chit. 354; S. C. 1 M. & A. 693, n.

The bankrupt being one of the directors of a life assurance office, deposits a policy of that office with his bankers, as a collateral security for advances, one of the bankers being also one of the auditors of the assurance office:—Held, that this was sufficient notice to the office of

the transfer of the bankrupt's interest in the policy, to prevent the claim of reputed ownership. *Ex parte Waitman, re Raikes*, 1835. 4 Dea. & Chit. 412; S. C. 2 M. & A. 364.

Where owner of shares in an insurance company transfers them by way of equitable mortgage, though he does not observe the rules of the company in regard to the mode of transfer, and though he continues to act as director without having any other shares than those assigned, (the being a shareholder to a certain extent alone entitling him so to act), yet if the transferee gives notice to the company of his mortgage, and the owner becomes bankrupt, they are taken out of his order and disposition, especially where the company make entry of the notice in their books in such manner as to evince their knowledge that such owner could not further dispose of the shares. Bare notice in such cases seems sufficient. *Ex parte Masterman, re Litt*, 4 Dea. & Chit. 751; S. C. 2 M. & A. 209.

A trader and soap manufacturer being indebted to his bankers in a sum of 13,147*l.* assigned to them his leasehold property, with all his engines, machines, &c. stock in trade and effects upon the same, in order to secure as well money then due, as money to be thereafter due from him to them on the balance of his account. The bankers had a power to sell the whole property assigned, including a policy of insurance on the

life of the trader; but he was at liberty to remain in possession till default made in payment. At the time of executing the assignment, the trader was possessed of other property worth 13,000*l.* which was not covered by it. The trader having become bankrupt, his assignees sued to recover the property assigned; but the jury found that the deed was executed, not in contemplation of bankruptcy, but with intent to give the defendants the means of taking possession of the property in the event of bankruptcy:—Held, that the assignment was good, and did not amount to an act of bankruptcy. *Carr v. Burdiss*, 5 Tyr. 136; S. C. 1 Crompt. Meeson & Roscoe, 443, 782.

To an action by the assignees of a bankrupt ship-owner for the freight of a voyage to India, accruing to him before his bankruptcy, the defendant pleaded that the shipowner, before his bankruptcy, assigned by deed the freight in question to *I.*, in trust to discharge a debt due from the ship-owner to *I.*, and to pay the surplus, if any, to the ship-owner; that the defendant had notice of such assignment, and that the freight, which was not sufficient to discharge the debt, had been demanded of him by *I.*:—Held, a good bar to the action. *Leslie v. Guthrie*, 1 Bing. N. C. 697.

Personal property may be transferred for a sufficient consideration, without writing, if the possession be

also transferred; and a debtor may prefer one creditor to another, if the debtor be not a trader; but if he be a trader he cannot prefer one creditor to another, unless he be pressed. A fraudulent delivery of goods by a trader will be of itself an act of bankruptcy. A delivery of goods to one to whom no debt was due would be such a fraudulent delivery; and the delivery would likewise be fraudulent, though a debt was due, if the transfer of the goods was made voluntarily, and in contemplation of bankruptcy. *Scott v. Thomas*, 6 C. & P. 611.

F., a merchant at Liverpool, used to consign goods to his agent at Bahia, in South America, for sale, and to draw bills upon the credit of and against such consignments, in proportion to their amount, to be paid by the agent out of the proceeds. Some bills so drawn, and negotiated by the indorsements of a house in London with which *F.* corresponded, were refused acceptance by the agent. The London house thereupon requested *F.* to write to his agent at Bahia, with orders, "that in case he did not pay *F.*'s drafts, he should immediately hand over such property as he might have of *F.*'s, of an equivalent value to the bills not paid by him, to the agent of the London house at Bahia." *F.* replied, that he would write to his agent, agreeably to these injunctions, directing him to hand over to the agent of the London house, "pro-

perty of *F.* in his hands, to cover the amount of bills that eventually might not be paid." Afterwards, and before the letter from *F.* to his agent reached Bahia, *F.* became bankrupt. *F.*'s agent subsequently handed over to the London house goods consigned to him as above mentioned, to an amount less than that of the bills unpaid:—Held, that there was no legal or equitable assignment of those goods to the London house before the bankruptcy, and that on that event the property in them vested in the assignees. In an action of trover brought by the assignees for the goods, in which the above facts were proved, the defendants also offered in evidence the letter written by *F.* to his agent at Bahia (after promising the London house to write, as above stated), in which he ordered that party to hand over all the property which he held on *F.*'s account to the agents of the London house: *Quære*, Whether the letter was admissible; but held, that if it were, the decision ought still to be the same. *Burn v. Carcalho*, 1 Adol. & Ellis, 883.

To assumpsit by two plaintiffs, for goods sold, &c., defendant pleaded the bankruptcy of one. Replication, that before the bankruptcy, the bankrupt plaintiff assigned to the other all his interest in the debt, and that the bankrupt now sued only as trustee for his co-plaintiff. The Court was of opinion that the replication was bad, for not stating that the debtor had had notice of the supposed assignment, although the defendant had pleaded

over without alleging the want of notice. But the plaintiff had leave to amend. *Dean v. James*, 1 Ad. & El. 809.

In trover by assignees for timber, an arbitrator to whom the cause was referred found that the bankrupt, before his bankruptcy, had on behalf of an unnamed principal (the defendant) taken in exchange a quantity of timber to be delivered free on board; and that he had at the same time bought other timber of the same party on his own account; that the timber was delivered to the bankrupt, and lay, till after the bankruptcy, on a common, mixed with other timber of the bankrupt, and in his actual possession: that the defendant, after the bankruptcy, but more than two months before the commission issued, wrote to the vendor, stating himself to be the principal, adopting the contract as to the goods taken in exchange (but no others), and directing that the bankrupt should not be suffered to take them; and that the vendor accepted him as purchaser accordingly. The arbitrator also found, that before the commencement of two months the defendant had required the bankrupt to deliver the timber belonging to him (the defendant), and that the bankrupt had proposed to make up a deficiency in the quantity by delivering some of his own timber: that no contract of sale was made as to the latter, nor did any thing further pass respecting the timber till within two months before the commission, when

the bankrupt made a formal delivery to the defendant of part of the sold and part of the exchanged timber, lying on the common as above-mentioned; and that the whole of the timber belonging to the defendant was in the order, possession, and disposition of the bankrupt, with the consent of the true owner, till after the bankruptcy:—Held, (assuming that the Court could review the arbitrator's finding as to the above facts), 1. That he was warranted in finding a delivery of the timber to the bankrupt, though it was not shipped. 2. That the timber remained in the bankrupt's apparent possession, with the owner's consent, up to the time of the above delivery. 3. That the delivery to the defendant, of the timber belonging to the bankrupt, was not referable to any contract protected by sect. 81. of the Bankrupt Act. *Shaw v. Harvey*, 1 Adol. & Ellis, 920.

ASSIGNMENT IN BANKRUPTCY OR INSOLVENCY.

See also PROVISIONAL ASSIGNMENT—

VACATING ASSIGNMENT—ASSETS IN BANKRUPTCY.

Under a commission prior to the 1 & 2 Will. 4. c. 56. where an assignee is removed since the act, it is not necessary that there should be a new assignment, or that the prior assignment should be vacated. *Smith v. De Tastet*, 1834. 4 Dea. & Chit. 360; S. C. 1 M. & A. 370.

The copyhold property of an in-

solvent debtor vests in his assignee by virtue of the assignment under 7 G. 4. c. 57. s. 11. without entry on the court rolls. *Doe d. Smith v. Glenfield*, 1 Bing. N. C. 729.

Under the thirtieth section of the Insolvent Debtors' Act (7 G. 4. c. 57.) a debt due to the insolvent will pass to the provisional assignee, although it has been assigned to a third party before the insolvent's imprisonment, if notice of such assignment was not given to the debtor before such imprisonment. *Buck v. Lee*, 1 Ad. & El. 804.

In trover by a bankrupt against his assignees to try the validity of the commission:—Held, that secondary evidence of the assignment might be given, after proving that it was lost before it was entered of record, as directed by 6 G. 4. c. 16. s. 96., and 2 & 3 W. 4. c. 114. s. 7. *Seem*, proof of the plaintiff's acquiescence in the defendant's acts as assignee, and dealing with him in that character, would render proof of the assignment unnecessary. *Giles v. Smith*, 5 Tyr. 15; S. C. 1 Crom. M. & R. 462.

Where no fraud has been committed, the assignment by an insolvent debtor to his provisional assignee, under 7 G. 4. c. 57. passes only such property as the insolvent has at the time of the assignment. *Sims v. Simpson*, 1 Bing. N. C. 306; S. C. 1 Scott, 177.

ATTACHMENT.

See also STAYING ATTACHMENT.

Court will not issue attachment in the long vacation, unless there is fear of the party's absconding. *Ex parte Hunt, re Fox*, 1834. 4 Dea. & Chit. 503.

AUDIT.

Commissioners cannot open audited accounts of assignees without permission of Court of Review. *Ex parte Benham, re Bramwell*, 2 M. & A. 272.

AWARD.

A bankrupt conveys his real estate to two trustees upon certain trusts for the payment of his debts, and subsequently enters into an agreement with them as to the sale of the property; after which he takes forcible possession of part of it, and the trustees bring an action of ejectment against him, which, with another action, is referred to the decision of an arbitrator. The award finds, that the creditors were entitled to recover in the action of ejectment, and directs that a sum of money which was due to the trustees for expenses incurred by them in the execution of the trusts shall be paid by instalments, and in default of payment, that the property shall be sold, and the proceeds applied in discharge of the debt due to the trustees:—Held, that the award was no charge upon the land; but that it did not destroy the lien thereon, which the deed had expressly given to the trustees for the expenses incurred by them in the execution of

the trusts. *Ex parte Coppard, re Thornton*, 1833, 4 Dea. & Chit. 102.

BAIL.

The defendant having been committed to the King's Bench prison by a Court of Bankruptcy, this Court gave the bail time to render, notwithstanding the committal was under a London commission of bankrupt, and the bail had justified after the bankruptcy, after judgment, and at the request of the defendant's attorney. *Waugh v. Ashford*, 1 Bing. N. C. 294; S. C. 1 Scott, 167.

Proceedings taken on the bail-bond were stayed, on the terms that it should stand as a security. Subsequently the principal and his bail became severally bankrupt, and obtained their certificates. On motion to have the bail-bond delivered up to be cancelled, and to enter an exoneration on the bail-piece:—Held, that as the bankruptcy and certificates of the bail were not disputed, the Court would relieve them under the powers of 4 & 5 Ann. c. 16. s. 20. by staying proceedings on the bail-bond, though they would not order it to be delivered up, as the plaintiff was entitled to keep it in order to claim to prove in respect of it under the fiats; and the Court moulded the rule accordingly, without calling on the bail to pay costs. *Slatter v. Scott*, 4 Tyr. 372; S. C. 2 Crom. & Mee. 475.

BALANCE SHEET.

The balance sheet of a bank-

rupt, given on oath under his commission, is not admissible against him on a criminal charge. *Rex v. Britton*, 1 Moody & Rob. 297.

BANKRUPTCY, ACT OF.

See ACT OF BANKRUPTCY.

BANKRUPTCY, EFFECT OF.

Premises were let for 21 years to A., his executors, administrators and assigns, with a proviso, that if the lessee, his executors, administrators or assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him &c. by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him, whereby any reasonable probability might arise of the estate being extended, &c., the estate should determine; and the lessor have power to re-enter. Before the term ended, the lessee died, and by will bequeathed the premises held under this demise to his executors, on trust for his (testator's) widow. One executor died and the survivor became bankrupt:—Held, that the lessor had a right to re-enter, which he might enforce by ejectment. *Doe dem. Bridgman v. David*, 5 Tyr. 125; *S. C.* 1 Crom. M. & R. 405.

A lease contained a proviso for re-entry, if the lessee, "his executors or administrators, or either of them," should become bankrupt. The executor of the lessee became bankrupt:—Held, that the landlord was entitled to recover in ejectment, al-

though a term vested in a person as executor does not on his bankruptcy pass to the assignee. *Doe dem. Williams v. Davies*, 6 C. & P. 614.

A commission of bankrupt does not operate as a dissolution of the contract of hiring between the bankrupt and his clerk. If the clerk, being hired for a year, continue in the bankrupt's office after the bankruptcy, and then in the middle of the year, by mutual consent, the contract be rescinded, on the understanding that the clerk is to be paid rateably for his services during the current year, the clerk is not barred by the certificate from recovering all the wages due from the expiration of the year last before the commission up to the time of rescinding; no part of such wages being provable under the commission. The provision in 6 G. 4. c. 16. s. 48. for payment of clerks and servants, makes no difference in this respect. A jury may infer such an understanding from the clerk having continued after the bankruptcy in the bankrupt's office as long as the bankrupt's brother remained there managing the business (as he had also done for a month before the bankruptcy), although, in fact, there was nothing for the clerk to do after the bankruptcy. *Thomas v. Williams*, 1 Ad. & El. 685.

To assumpsit by two plaintiffs, for goods sold, &c., defendant pleaded the bankruptcy of one. Replication, that before the bankruptcy, the bankrupt plaintiff assigned to the

other all his interest in the debt, and that the bankrupt now sued only as trustee for his co-plaintiff. The Court was of opinion that the replication was bad, for not stating that the debtor had had notice of the supposed assignment, although the defendant had pleaded over without alleging the want of notice. But the plaintiff had leave to amend. *Dean v. James*, 1 Ad. & El. 809.

Defendant, after putting in his answer, became bankrupt. Plaintiff, before assignees were brought before Court, obtained an order to refer the answer for scandal and impertinence:—Held, that order was regular. *Booth v. Smith*, 5 Sim. 639.

Proceedings taken on the bail-bond were stayed, on the terms that it should stand as a security. Subsequently the principal and his bail became severally bankrupt, and obtained their certificates. On motion to have the bail-bond delivered up to be cancelled, and to enter an exonertur on the bail-piece:—Held, that as the bankruptcy and certificates of the bail were not disputed, the Court would relieve them under the powers of 4 & 5 Ann. c. 16. s. 20. by staying proceedings on the bail-bond, though they would not order it to be delivered up, as the plaintiff was entitled to keep it in order to claim to prove in respect of it under the fiats; and the Court moulded the rule accordingly, without calling on the bail to pay costs. *Slatter v. Scott*, 4 Tyr. 372; *S. C.* 2 Crom. & Mees. 475.

BANKRUPT,

Generally.

On a petition to stay the certificate by a creditor, at whose suit the bankrupt is in custody, the bankrupt must be discharged before the petition can be heard. *Ex parte Green, re Armitstead*, 1834. 4 Dea. & Ch. 112; *S. C.* 2 M. & A. 31.

A creditor, who becomes bankrupt after proving his debt, may nevertheless petition to stay the first bankrupt's certificate, if the assignees of the creditor do not interfere. *Ex parte Taylor, re Percival*, 1834. 4 Dea. & Ch. 125; *S. C.* 2 M. & A. 36.

After repeated acts of acquiescence of the bankrupt in the validity of a commission, and the dismissal of a former petition by him to the Lord Chancellor to supersede it, the Court will restrain him from bringing actions against his assignees. *Ex parte White, re Britten*, 1835. 4 Dea. & Ch. 279; *S. C.* 2 M. & A. 104.

Upon very slight circumstances of acquiescence, and where the bankrupt has lain by for twenty-two years without taking any active steps to upset the commission, this Court will, upon petition of assignees and a purchaser under the commission, grant an injunction to restrain actions commenced by the bankrupt against purchasers under the commission. *Ex parte Davy, re Chambers*, 1834. 4 Dea. & Ch. 322; *S. C.* 1 M. & A. 283.

Where the bankrupt petitions

for a supersedeas, with the consent of creditors, and it appears that the Commissioners have adjourned his last examination *sine die*, the Court will not supersede without knowing the reason of such adjournment. *Ex parte Gudge, re Gudge*, 1834. 4 Dea. & Ch. 358; S. C. 1 M. & A. 341.

A notice to produce the proceedings must be served on the assignees, not on the bankrupt. *Ex parte and re Daly*, 1834. 4 Dea. & Ch. 364.

Costs ordered against bankrupt to be set off against those ordered in his favour. *Ex parte Hawley, re Richards*, 1834. 4 Dea. & Ch. 572.

A trader, in embarrassed circumstances, absented himself from his house from the 16th of February till the 9th of March. Upon an issue, whether he had committed an act of bankruptcy on or before the 5th of March, two letters written by him on the 16th January preceding, asking for time on two bills of exchange payable by him in February, were received in evidence to show the motive of his absence. *Smith v. Cramer*, 1 Scott, 541; S. C. 1 Bing. N. C. 585.

A written statement made by a bankrupt, before his bankruptcy, of his debts and credits, is evidence as showing that he knew of his own insolvency. *Scott v. Thomas*, 6 C. & P. 611.

The declarations of a trader made shortly after an absence, are not admissible to prove such absence an

act of bankruptcy. *Semble*, That a breach of an appointment by a trader to call at his creditor's house to pay a debt, is not an act of bankruptcy. *Lees v. Marton*, 1 Moody & Rob. 210.

Depositions of deceased witnesses taken before Commissioners of bankrupt on the opening of a commission, and subsequently inrolled by the assignees afterwards, pursuant to the 6 Geo. 4. c. 16. s. 96., are not admissible in evidence against the assignees acting under the commission, in an action brought by the bankrupt against such assignees, for the purpose of disputing the validity of the commission. *Chambers v. Bernasconi*, 1 Crom. M. & R. 347.

Who may be.

See also TRADER AND TRADING.

B., who was indebted to *G.* in a sum exceeding 100*l.*, became a trader in Scotland, and after the discontinuance of his trade, but before the concerns of his trade were wound up, and being still indebted to *G.*, committed an act of bankruptcy:—Held, that he was liable to a sequestration as a notour bankrupt, upon debt, trading, and act of bankruptcy. *Baillie v. Grant*, 6 Bligh, 459.

Liabilities generally.

The balance sheet of a bankrupt, given on oath under his commission, is not admissible against him on a criminal charge. *Rex v. Britton*, 1 Moody & Rob. 297.

Defendant, after putting in his answer, became bankrupt. Plaintiff, before assignees were brought before Court, obtained an order to refer the answer for scandal and impertinence:—Held, that order was regular. *Booth v. Smith*, 5 Sim. 639.

Liability for Costs.

A bankrupt who has obtained his certificate loses his privilege as to costs. *Ex parte* and *re Lomas*, 1834. 4 Dea. & Ch. 258; *S. C.* 1 M. & A. 525. See also *Ex parte Hawley*, *re Richards*, 4 Dea. & Chit. 572.

Where the bankrupt vexatiously petitions to supersede for want of an act of bankruptcy, which he was evidently aware of having committed, the petition was dismissed with costs. *Ex parte* and *re Thompson*, 1834. 4 Dea. & Ch. 534.

Allowance.

Under a joint and separate fiat the amount of each bankrupt's allowance is to be estimated, not upon the gross joint estate and his separate estate, but upon his share of the joint estate, together with his separate estate. *Ex parte* and *re Lomas*, 1834. 4 Dea. & Ch. 240; *S. C.* 1 M. & A. 525.

Allowance for Maintenance.

Though the assignees, with the concurrence of Commissioners, have ordered an allowance for maintenance, (under 6 Geo. 4. c. 16. s. 114.,) till the bankrupt has passed his last exami-

nation, which order remains on the proceedings, yet if the assignees afterwards withhold the maintenance, on the ground of the final examination being adjourned *sine die*, the Court has no power to interfere, either as to the maintenance or the passing of the examination. *Ex parte* and *re Hall*, 1834. 4 Dea. & Ch. 530.

Certificate generally.

An uncertificated bankrupt cannot petition that his assignees may be ordered to account, without alleging that his estate will produce a surplus after paying 20s. in the pound. *Ex parte* and *re Ryley*, 1834. 4 Dea. & Ch. 50.

A bankrupt who has obtained his certificate loses his privilege as to costs. *Ex parte* and *re Lomas*, 1834. 4 Dea. & Ch. 258; *S. C.* 1 M. & A. 525.

Where a commission issued in 1824, under which the bankrupt never obtained his certificate, and a fiat issued against him in 1832, the Court refused, under the circumstances, to supersede the fiat. *Ex parte Devas*, *re Kenton*, 1834. 4 Dea. & Ch. 366; *S. C.* 1 M. & A. 420.

Omission of year in date to signature of certificate by creditor, where the date was properly attached to preceding signature, rectified. Officer ordered to pass such certificates in future without putting parties to expense of petition. *Re Buckley*, 1834. 4 Dea. & Ch. 504.

The certificate not stayed for misconduct before the fiat. *Ex parte Gordon, re Castell*, 2 M. & A. 80.

Effect of Certificate.

A commission of bankrupt does not operate as a dissolution of the contract of hiring between the bankrupt and his clerk. If the clerk, being hired for a year, continue in the bankrupt's office after the bankruptcy, and then in the middle of the year, by mutual consent, the contract be rescinded, on the understanding that the clerk is to be paid rateably for his services during the current year, the clerk is not barred by the certificate from recovering all the wages due from the expiration of the year last before the commission up to the time of rescinding, no part of such wages being provable under the commission. The provision in 6 Geo. 4. c. 16. s. 48. for payment of clerks and servants, makes no difference in this respect. A jury may infer such an understanding from the clerk having continued, after the bankruptcy, in the bankrupt office, as long as the bankrupt's brother remained there managing the business (as he had also done for a month before the bankruptcy), although, in fact, there was nothing for the clerk to do after the bankruptcy. *Thomas v. Williams*, 1 Ad. & El. 685.

Allowance of Certificate.

Special order as to the allowance of a bankrupt's certificate, where the

signature of one of the creditors had been affixed to it under a power of attorney, and there was no affidavit of the execution of the power of attorney. *Ex parte and re Dunstan*, 1834. 4 Dea. & Chit. 30; S. C. 1 M. & A. 619.

Petition for Allowance of Certificate.

A cross-petition by the bankrupt for allowance of the certificate, will not be advanced on motion of course, pending the reference for scandal of affidavits filed in answer to the petition to stay the certificate, on the ground that the latter petition was improperly served. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Chit. 217.

Petition to Stay Certificate.

On a petition to stay the certificate by a creditor, at whose suit the bankrupt is in custody, the bankrupt must be discharged before the petition can be heard. *Ex parte Green, re Armitstead*, 1834. 4 Dea. & Chit. 112; S. C. 2 M. & A. 31.

The rule on petition to stay certificate is, that the party objecting to the certificate must himself make out a case to stay it; the bankrupt is not bound to answer mere allegations founded on information and belief. *Ex parte Green, re Armitstead*, 1834. 4 Dea. & Chit. 112; S. C. 2 M. & A. 31.

The non-payment of any dividend is not, of itself, a sufficient reason to stay the certificate. *Ex parte Green*,

re Armitstead, 1834. 4 Dea. & Chit. 112; S. C. 2 M. & A. 31.

A creditor, who becomes bankrupt after proving his debt, may nevertheless petition to stay the first bankrupt's certificate, if the assignees of the creditor do not interfere. *Ex parte Taylor, re Percival*, 1834. 4 Dea. & Chit. 125; S. C. 2 M. & A. 36.

A cross-petition by the bankrupt for allowance of the certificate, will not be advanced on motion of course, pending the reference for scandal of affidavits filed in answer to the petition to stay the certificate, on the ground that the latter petition was improperly served. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Chit. 217.

As a general rule, a petition to stay certificate must be served on bankrupt two clear days before the day for which it is answered. But where a petition to stay certificate was answered for the 9th December, and on the 7th the bankrupt's solicitor requested the petitioner's solicitor to postpone the hearing of the petition for a week, and undertook to serve it on the bankrupt; *semble*, the bankrupt could not avail himself of the objection to service. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Chit. 218; S. C. 1 M. & A. 607.

Where on petition to stay certificate petitioner does not appear, and petition is dismissed, certificate not

ordered to go without the production of an affidavit that there is no collusion. *Ex parte Hetherington, re Glossop*, 1834. 4 Dea. & Chit. 224.

Service of petition to stay certificate not properly supported, where affidavit merely states inability to serve bankrupt personally, but that the bankrupt's solicitor had acknowledged bankrupt to be fully aware of petition and its nature. *Ex parte Levy, re Glossop*, 1835. 4 Dea. & Chit. 224.

The Court will in general rehear petitions and rescind former orders upon fresh evidence tendered, but not where such orders are made upon petitions to stay certificate or to supersede or annul fiat. *Ex parte and re Lavender*, 1835. 4 Dea. & Chit. 497.

On petition to prove and stay certificate, it is not necessary to charge directly what debt was tendered for proof to the Commissioner, or when it was rejected. *Ex parte Robinson, re Case*, 1834. 4 Dea. & Chit. 499.

On petition to stay certificate, it must appear from the petition itself that the party applying is a creditor; if it appear merely inferentially, that is sufficient; if it merely so appear from the affidavits in support, that is insufficient; and no amendment of petition to stay certificate allowed. *Ex parte Robinson, re Case*, 1834. 4 Dea. & Chit. 499.

Examination.

On petition by assignees to expunge a proof, the examination of the bankrupt before the Commissioners, taken at the time the proof was admitted, is receivable in evidence. *Ex parte Freeman, re Clay*, 1835. 4 Dea. & Chit. 404.

To justify bankrupts' committal for unsatisfactory answers, the Commissioners should point them out and press those points particularly. *Ex parte and re Lee*, 2 M. & A. 15.

An entry in a bankrupts' examination of a certain sum being due to A., is evidence of an account stated between them, and is a sufficient acknowledgment to take the case out of the statute of limitations. But in an action by an attorney for business done, for which no signed bills had been delivered in pursuance of the statute, an admission by the defendant, in an examination before the Commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated. The plaintiff, after being nonsuited, took out a fiat in bankruptcy against the defendant:—The Court refused to allow the proceedings to be stayed without costs, on a suggestion that the case was within the 6 Geo. 4. c. 16. s. 59. *Eicke v. Nokes*, 4 M. & S. 585; S. C. 1 Moody, 359.

Surrender.

Leave to surrender after 42d

day, where bankrupt not guilty of any misconduct, always given with costs out of estate, though petition do not pray costs: joint fiat having subsequently issued, question, which estate should bear costs, reserved. *Ex parte Smith*, 4 Dea. & Chit. 810; S. C. 2 M. & A. 382.

Executor.

An executor may prove against a bankrupt co-executor, without an order for that purpose. *Ex parte Courtney, re Davis*, 1835. 4 Dea. & Chit. 456; S. C. 2 M. & A. 227.

By will the father-in-law of the bankrupt gave 4000*l.* in trust for his daughter for life, to her separate use, then to the bankrupt for life, and then to the issue of the marriage. The will, reciting that the bankrupt was indebted to the testator 6000*l.* on bond, declared that so much of the debt on the bond as remained unpaid in the testator's life-time should go n redemption and satisfaction of the above bequest of 4000*l.* Prior to the bankruptcy, and subsequently by means of dividends from his estate, 1069*l.*, part of the 6000*l.* bond debt, was paid off and invested in the funds. On petition of the assignees, claiming to be entitled to the interest of the 1069*l.*, the wife being dead, held (Sir J. Cross dissent.) that, until the 4000*l.* should be made up, the 1069*l.* should accumulate; after which, the assignees were declared entitled to the interest for the bank-

rupt's life. *Ex parte Young, re Prior*, 1835. 4 Dea. & Ch. 645.

BARRISTER.

A petitioner, claiming a portion of the bankrupt's property, has no right to call for the production of a case stated by the assignees for counsel's opinion, for the purpose of showing that the bankrupt has prevaricated in his statements. *Ex parte* and *re Collier*, 1834. 4 Dea. & Chit. 364.

A country fiat having been directed to three barristers, under the 1 & 2 Will. 4. c. 56., the solicitor neglected (on account of the expense) to summon one of them, the petitioner, who throughout evinced his willingness and claimed the right to attend. Held, that the Court had jurisdiction at the instance of the barrister to interfere: and ordered that the solicitor should summon such barrister in future, and recompence him for all fees which he would otherwise have received. *Ex parte Douglass*, 4 Dea. & Chit. 768. S. C. 2 M. & A. 218. This is followed in *Ex parte Williams*, 2 M. & A. 616.

Barrister cannot petition to have his name inserted in the commission. *Ex parte Ward*, 2 M. & A. 219, n.; but see *Ex parte Douglass*, 4 D. & C. 768; 2 M. & A. 218.

Commissioners recommended to hear counsel against adjudication. *Re Walker*, 2 M. & A. 267.

BILL OF EXCHANGE.

Where goods, in which the bank-

rupts were jointly interested with *A. B.*, were pledged with a creditor to secure the payment of an acceptance of the bankrupt's, and part of the proceeds were received by the creditor before he applied to prove:—Held, that he must deduct the amount so received before he could prove on the acceptance. *Aliter*, if the goods had belonged to *A. B.* alone. *Ex parte Prescott, re Thompson*, 1834. 4 Dea. & Chit. 23.

G. & Co. to secure a permanent loan from their bankers, *V. & Co.*, to the amount of 20,000*l.*, agree to deposit with them their joint note for that amount; and as collateral security, 10,000*l.* in bills not to be moved, and 10,000*l.* in bills to be with *G. & Co.* during the day, and also to leave a standing balance on the account every night of 4000*l.* In pursuance of this agreement, *G. & Co.* every evening delivered to *V. & Co.* bills of various amounts, but not less than 10,000*l.* on any occasion, unless their cash balance exceeded 4000*l.*; and every morning they received these bills back again from *V. & Co.*, which were either returned, or others of equal amount substituted, every evening. On the last day of dealing between the parties, *G. & Co.* informed *V. & Co.* that as they had drawn out the cash balance which they ought to have left in their hands, they had given additional security to *V. & Co.* by lodging bills with them to a larger amount. The amount of the sum so overdrawn was, in fact, 3000*l.*,

and the amount of the bills then deposited was 22,666*l.*, including a note of hand of *B. & Co.* for 10,000*l.*, for which *B. & Co.* had only received a partial consideration from *G. & Co.*; but *V. & Co.* had no notice of such want of consideration attaching to this note. At the closing of the business between *G. & Co.* and *V. & Co.*, a balance was due to *V. & Co.* of 35,386*l.*, for which they held the deposit of the bills and note to the amount of 22,666*l.*, besides the note of *G. & Co.* for 20,000*l.* *G. & Co.* afterwards stopped payment, when *V. & Co.* gave them a letter of licence, which was however subsequently recalled. *B. & Co.* became bankrupt:—Held, that *V. & Co.* were entitled to prove the full amount of the note for 10,000*l.* against *B. & Co.*'s estate; but that as the specified purpose of the deposit of the bills by *G. & Co.* with *V. & Co.* was not to secure any general balance, but merely the two loans of 20,000*l.* and 3000*l.*; the bills deposited were to be considered only as collateral security for those two sums, and not for the amount of the whole debt due to *V. & Co.*; that the proceeds of the other bills and of *G. & Co.*'s joint note must therefore be deducted from the 23,000*l.*; and that *V. & Co.* were entitled to receive dividends on their proof against *B. & Co.*'s estate, until they should have received full payment of the unsatisfied balance of this latter sum. *Ex parte Vere, re Bentley, 1835.* 4

Dea. & Chit. 295; S. C. 2 M. & A. 123.

A. and *B.* give a joint promissory note, upon which money is lent by *C.* to them, and by them to *D.* *B.* becomes bankrupt, and *A.* is obliged, after the bankruptcy, to pay the note. Held, that he is not a surety for *B.*, but that *A.* and *B.* are principal debtors or co-sureties, and therefore that *A.* could not prove for a moiety of the note against *B.*'s estate. *Ex parte Porter, 4 Dea. & Chit. 774; S. C. 2 M. & A. 281.*

An affidavit in support of deposition of proof on a bill should state consideration. *Ex parte Maberly, re Young, 2 M. & A. 23.*

BILL OF LADING.

W. shipped at Leghorn twenty-three casks of oil, on account and by the order of *L.* at Liverpool, and transmitted to him a bill of lading. Before the arrival of the oil, *L.* indorsed the bill of lading, and deposited it with *H.*, who advanced money on it, having previously advanced money on other goods (the property of *L.*) deposited with him. On the arrival of the oil, *L.* having previously become bankrupt, and *W.* not having been paid for it, *W.*'s agents claimed it of the master of the ship; but the latter delivered it to *H.*, who afterwards sold the goods of *L.* as well as the oil of *W.* The net proceeds of the goods belonging to *L.* were sufficient to satisfy the debt due from *L.* to *H.* *H.* paid himself his

debt, and deposited the net proceeds of *W.*'s oil with a third person, to abide the event of the award of an arbitrator, to whom all disputes between *W.* and the assignees of *L.* were referred. The arbitrator having stated the above facts on his award for the opinion of this Court:—Held, that *W.*, the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of *L.*, because the property in and the right to the possession was then vested in *H.*, the indorsee of the bill of lading for value; and further, that *W.* had not, by reason of such claim, any legal right to the possession of the goods after *H.*'s lien was satisfied: but that in a Court of Equity, such transfer to *H.* would be treated as a pledge or mortgage only, and therefore *W.*, by his attempted stoppage in transitu, acquired a right to the goods in equity, subject to *H.*'s lien against the assignees of *L.* Held, secondly, that *W.*, by means of his goods, had become surety to *H.* for *L.*'s debt, and had a clear equity to oblige *H.* to pay his debt out of *L.*'s own goods deposited with him in ease of such surety; and all the goods both of *W.* and *L.* having been sold, *W.* might insist on the proceeds of *L.*'s goods being appropriated to payment of the debt: and, therefore, that *W.* was entitled to have all the proceeds of the oil paid over to him. *Re the Arbitration between Westzinthus and*

Assignees of Lapagè and Co.: and between Rogers and Co. and the same Assignees, 5 Barn. & Adol. 817.

BREACH OF APPOINTMENT.

A bankrupt, pending a negotiation for the loan of money, is arrested in the country and discharged on bail. He at the time promises to meet the creditor and his solicitor on the following day; however, he goes to London, in order to procure part of the loan, and therewith to pay the creditor the debt instead of giving security. He writes to the solicitor stating the fact and its object, and promises to return in a day or two and pay the debt. He is, however, detained longer in London, *bond fide*, upon the same negotiation:—Held, that evidence of the intent to delay his creditor was rebutted. *Ex parte and re Lavender*, 1834. 4 Dea. & Chit. 484.

The bare neglect to keep an appointment to meet a creditor, does not amount to an act of bankruptcy. *Ex parte and re Lavender*, 1834. 4 Dea. & Chit. 484. See also *Lees v. Marton*, 1 Moody & Rob. 210.

CERTIFICATE OF BANKRUPT.

See BANKRUPT'S CERTIFICATE.

CERTIFICATE OF REGISTRAR.

Order for four-day order towards commitment, must be prayed by petition, not motion, and certifi-

cate of Registrar of non-conformity, should be dated the very day of the application for the short order. *Ex parte Myers, re Sudell*, 1835. 4 Dea. & Chit. 579.

CERTIFICATE OF COMMISSIONERS.

Semble, this Court has no jurisdiction to order the Commissioner to certify the consent of creditors to a supersedeas, especially when he objects because fees payable under 1 & 2 Will. 4. c. 56. ss. 45, 46. are not paid. *Re Hawker*, 1834. 4 Dea. & Chit. 569.

If the Commissioners certify that a consolidation will be beneficial, the assignees need not be served. *Ex parte Smith, re Shaw*, 2 M. & A. 60.

CESTUI QUE TRUST.

See TRUSTEES, AND CESTUI QUE TRUST.

CHARGE ON LAND.

A bankrupt conveys his real estate to two trustees upon certain trusts for the payment of his debts, and subsequently enters into an agreement with them as to the sale of the property; after which he takes forcible possession of part of it, and the trustees bring an action of ejectment against him, which, with another action, is referred to the decision of an arbitrator. The award finds, that the creditors were entitled to recover in the action of ejectment, and directs that a sum of money which was due to the trustees for expenses incurred by them in the

execution of the trusts shall be paid by instalments, and in default of payment, that the property shall be sold, and the proceeds applied in discharge of the debt due to the trustees:—Held, that the award was no charge upon the land; but that it did not destroy the lien thereon, which the deed had expressly given to the trustees for the expenses incurred by them in the execution of the trusts. *Ex parte Coppard, re Thornton*, 1833. 4 Dea. & Chit. 102.

CHATTELS.

See DELIVERY UP OF CHATTELS.

CHOSE IN ACTION.

To assumpsit by two plaintiffs, for goods sold, &c., defendant pleaded the bankruptcy of one. Replication, that before the bankruptcy, the bankrupt plaintiff assigned to the other all his interest in the debt, and that the bankrupt now sued only as trustee for his co-plaintiff. The Court was of opinion that the replication was bad, for not stating that the debtor had had notice of the supposed assignment, although the defendant had pleaded over without alleging the want of notice. But the plaintiff had leave to amend. *Dean v. James*, 1 Ad. & El. 809.

Under the thirtieth section of the Insolvent Debtors' Act (7 G. 4. c. 57.) a debt due to the insolvent will pass to the provisional assignee, although it has been assigned to a third party before the insolvent's imprisonment, if notice of such assign-

ment was not given to the debtor before such imprisonment. *Buck v. Lee*, 1 Ad. & El. 804.

To an action by the assignees of a bankrupt ship-owner for the freight of a voyage to India, accruing to him before his bankruptcy, the defendant pleaded that the ship-owner, before his bankruptcy, assigned by deed the freight in question to *I.*, in trust to discharge a debt due from the ship-owner to *I.*, and to pay the surplus, if any, to the ship-owner; that the defendant had notice of such assignment, and that the freight, which was not sufficient to discharge the debt, had been demanded of him by *I.*:—Held, a good bar to the action. *Leslie v. Guthrie*, 1 Bing. N. C. 697.

CLAIM.

Where property pledged by the bankrupt with a creditor is claimed by a third person, the creditor may enter a claim on the proceedings for the whole of his debt, till the legal right to the property is determined. *Ex parte Williams, re Raikes*, 1835. 4 Dea. & Chit. 180.

In 1780 *A.* and *B.* were partners as army agents, having been in the habit of receiving money from the government for the pay of certain regiments. In that year *A.* retires, and *B.* and *C.* carry on the business as before, but without coming to any account with the Crown, and without any account whatever being taken of the liabilities of the firm of *A.* and *B.* at the time of *A.*'s retiring.

In 1783, *B.* & *C.* are required by the government to render the account of monies issued for the several regiments during the period of the existence of the firm of *A.* and *B.* and of *B.* and *C.*, which they do without any break appearing in them at 1780, when *A.* retired. But the accounts rendered do not state any debtor and creditor account as between the respective firms and the Crown, but show simply the sums issued in respect of each regiment, and how they have been applied. On the formation of the firm of *B.* and *C.*, the old ledgers are used; there was no agreement to take to the liabilities of *A.* and *B.*, and every thing is carried on in the same manner as before till 1783, when the 23 Geo. 3. c. 30. was passed, which directs that an estimate is to be thenceforth prepared of the amount which will be required for the purposes of the army; that the amount is to be paid from time to time into the bank; that the paymaster of the forces is to communicate to the Secretary at War the sums that will be required for the purposes of the different regiments; that the agents of the different regiments are to communicate to the Secretary at War the sums that will be required for the different regiments, and an issue is then made to the agent for the particular purposes of those regiments, and annual accounts were required to be rendered by the several agents. Upon this footing matters are

carried on till 1804, when *B.* and *C.* became bankrupts, and a balance of 150,000*l.* is found due to the Crown; and in 1820, and not before, it is found that 91,000*l.*, part of the 150,000*l.*, was due at the time of the retirement of *A.* *Semble*, under these circumstances, that *B.* and *C.* could not be presumed to have adopted the debt of *A.* and *B.*, and that the government could not be presumed to have assented thereto had such adoption existed; and, consequently, that the government had no right to prove the entire sum of 150,000*l.* against *B.* and *C.*'s estate. (*Cross, J. dissent.*) But it also appearing that the assignees had, by proceedings in the Court of Session in Scotland, treated the 91,000*l.* as due from their estate, and the government having, on the other hand, sued the representatives of *A.* in Scotland (subsequently to the discovery of the balance being due) so as to charge *A.* alone as the debtor, a claim was permitted to be entered till the result of the Crown's proceedings, which were still pending, against the representatives of *A.* was ascertained. *Ex parte Sandham*, 4 Dea. & Chit. 818.

CO-DEBTOR.

A. and *B.* give a joint promissory note, upon which money is lent by *C.* to them, and by them to *D.* *B.* becomes bankrupt, and *A.* is obliged, *after the bankruptcy*, to pay the note. Held, that he is not a surety for *B.*, but that *A.* and *B.* are

principal debtors or co-sureties, and therefore that *A.* could not prove for a moiety of the note against *B.*'s estate. *Ex parte Porter*, 4 Dea. & Chit. 774. *S. C.* 2 M. & A. 281.

COMMISSIONERS' CERTIFICATE.

See CERTIFICATE OF COMMISSIONERS.

COMMISSIONERS.

Power to administer oaths on affidavit, 5 & 6 *Will.* 4. c. 29. s. 24.

On an application by two creditors to the Commissioners to expunge a proof, under the 6 *Geo.* 4. c. 16. s. 60. the Commissioners have a discretionary power to adjudge to the creditor whose proof is sought to be expunged, such costs as he may think reasonable, including the costs of the meetings, as well as those of the creditor. And though the Commissioners may have allowed rather too much to the creditor, this will not make the order bad for the whole allowance, but the objecting parties may have the costs taxed. *Ex parte Kirkaldy, re Holt*, 1834. 4 Dea. & Chit. 52; *S. C.* 1 M. & A. 642.

Where a creditor applies to prove a debt, and claims a right to property in his possession, to which the Commissioners think he has no lien, the Commissioners should admit the proof, and leave the question of lien to be controlled merely by retention of the dividend. *Ex parte Dobson, re Thompson*, 1834. 4 Dea. & Chit. 69; *S. C.* 1 M. & A. 666.

Where the Commissioners expunged a proof, on the application of the assignees, and the creditor afterwards succeeded on a petition to have it restored, the Court gave him the costs of the petition, as well as of the proceedings before the Commissioners; making it an exception to the general rule, that costs are not given against the decision of the Commissioners. *Ex parte Brooks, re Moore*, 1835. 4 Dea. & Chit. 209; S. C. 2 M. & A. 78.

An *ex parte* order was obtained by the tenant of the assignees to refer it to the Commissioner to ascertain if a reduction of his rent would be beneficial to the bankrupt's estate. The Commissioner certified that it would, and that another person had tendered a higher rent than that to which he proposed to reduce the original rent. An application was made to confirm the certificate. A petition was presented by creditors, one of whom had offered the higher rent, to discharge the order of reference and the Commissioner's certificate. But the Court refused to interfere, leaving the petitioners to their remedy against the assignees, if they were aggrieved, as their rights were not bound by the proceeding, and as they were no parties to the order. Sir J. Cross, *dissent*. *Ex parte De Begnis, re Chambers*, 1834. 4 Dea. & Chit. 225; S. C. 1 M. & A. 277.

The Court has a general jurisdiction to entertain questions on the legality of commitment by Commissioners upon petition without habeas

corpus, and without the warrant of commitment being before it; especially where the objections to the committal would not appear on the face of the warrant. *Dubit*. Sir J. Cross, as to the production of the warrant. *Quare*, whether this Court has any jurisdiction to issue the writ of habeas corpus? *Ex parte and re Jones*, 1834. 4 Dea. & Chit. 536.

The Court has no jurisdiction to control the discretion of a Commissioner as to what documentary evidence he shall require to be produced to prove an act of bankruptcy. But the Court intimated its opinion that a letter written by the bankrupt's wife to a third party, in whose possession it remained, though it could not in any way afford direct evidence of the act of bankruptcy, (unless it was also proved that she was authorized by her husband to write it as his agent,) she not being examinable as a witness upon that point, yet might be ordered to be produced, to be used only as a clue to the procurement of other evidence as to the act of bankruptcy. *Ex parte Groom, re Chambers*, 1835. 4 Dea. & Chit. 640.

If defective affidavits be produced, Commissioner should not reject, but only adjourn proof. *Ex parte Maberly, re Young*, 2 M. & A. 23.

To justify a committal of bankrupt for not answering satisfactorily, the Commissioners should point out the unsatisfactory answers and press those points. *Ex parte and re Lee*, 2 M. & A. 15.

A single London Commissioner cannot fine for contempt. *Rex v. Faulkner*, 2 M. & A. 311.

Where Commissioners were absent from first meeting, the Court will appoint another. *Ex parte Hall, re Thompson*, 2 M. & A. 294.

Commissioners cannot open audited accounts of assignees without permission from Court of Review. *Ex parte Benham, re Bramwell*, 2 M. & A. 272.

COMMISSIONERS IN COUNTRY.

A country fiat having been directed to three barristers, under the 1 & 2 Will. 4. c. 56., the solicitor neglected (on account of the expense) to summon one of them, the petitioner, who throughout evinced his willingness and claimed the right to attend. Held, that the Court had jurisdiction at the instance of the barrister to interfere: and ordered that the solicitor should summon such barrister in future, and recompence him for all fees which he would otherwise have received. *Ex parte Douglass*, 4 Dea. & Chit. 768; S. C. 2 M. & A. 218. This is followed in *Ex parte Williams*, 2 M. & A. 616. Contrà, *Ex parte Ward*, 2 M. & A. 219, n.

Barrister cannot petition to have his name inserted in the commission. *Ex parte Ward*, 2 M. & A. 219, n.: but see *Ex parte Douglass*, 4 Dea. & Chit. 768; 2 M. & A. 218.

Commissioner having improperly

rejected proof because the claim was merged in felony, the petitioner was allowed costs out of estate. *Ex parte Birks*, 2 M. & A. 208, n. (a).

COMMITMENT.

See also WARRANT OF COMMITMENT.

The Court has a general jurisdiction to entertain questions on the legality of commitment by Commissioners upon petition without habeas corpus, and without the warrant of commitment being before it; especially where the objections to the committal would not appear on the face of the warrant. *Dubit.* Sir J. Cross, as to the production of the warrant. *Quære*, whether this Court has any jurisdiction to issue the writ of habeas corpus? *Ex parte and re Jones*, 1834. 4 Dea. & Chit. 536.

Order for four-day order, towards commitment, must be prayed by petition, not motion; and certificate of Registrar of non-conformity, should be dated the very day of the application for the short order. *Ex parte Myers, re Sudell*, 1835. 4 Dea. & Chit. 579.

To justify a committal of bankrupt for not answering satisfactorily, the Commissioners should point out the unsatisfactory answers, and press those points. *Ex parte and re Lee*, 2 M. & A. 15.

When all is regular, the four-day order to pay, &c., or stand committed, is of course at the office. *Ex parte and re Smith*, 2 M. & A. 213.

The defendant having been com-

mitted to the King's Bench prison by a Court of Bankruptcy, this Court gave the bail time to render, notwithstanding the committal was under a London commission of bankruptcy, and the bail had justified after the bankruptcy, after judgment, and at the request of the defendant's attorney. *Wagh v. Ashford*, 1 Bing. N. C. 294; S. C. 1 Scott, 167.

The Lord Chancellor is not liable to an action in respect of an order of commitment made by him in bankruptcy, even admitting such order to have been irregular. *Dicas v. Lord Brougham and Vaus*, 1 Moody & Rob. 309.

COMPETENCY OF WITNESS.

See WITNESS, COMPETENCY OF.

COMPOSITION.

Creditor having agreed to accept a composition for his debt, takes bills for the amount of the composition, and also has a bond assigned to him as part security for the composition. The composition deed contained a clause, that on default in payment of instalments, the composition should fall to the ground. Default is made, and subsequently a fiat issues:—Held, that creditor might prove balance of original debt remaining due, and also retain the bond. *Ex parte Reay, re Champion*, 1834. 4 Dea. & Chit. 525; S. C. 2 M. & A. 33.

On an agreement for a composition, *A.* the creditor received, as a further security, the assignment of

several debts due to *B.* the debtor. Default was made in payment of the instalments of the composition, and *B.* became bankrupt. Held, that *A.* might prove the amount of his original debt, but that he could not also retain the benefit of the assignment of the debts. The value of them was therefore directed to be ascertained, and liberty given for *A.* to prove for the difference, if he elected to retain them. *Ex parte Ellis*, 4 Dea. & Chit. 736; S. C. 2 M. & A. 370.

CONSENT.

See also ACQUIESCENCE—FIAT, ANNULING, &c.

Fiat will not be superseded on consent under the composition clauses (6 Geo. 4. c. 16. s. 133, 134,) until after the second meeting. *Ex parte Boardman*, 4 Dea. & Chit. 724; S. C. 2 M. & A. 209.

Quære, if the C. R. has jurisdiction to entertain a petition seeking delivery up of specific chattel. It has, if parties respondent consent to be bound. But respondent being trustee cannot consent. *Ex parte Ellison*, 4 Dea. & Chit. 725.

On petition to annul on consent under 6 Geo. 4. c. 16. s. 133, 134. the assignees must be served. *Ex parte and re Race*, 2 M. & A. 242.

CONSIDERATION.

Affidavit to support deposition of proof on bill should state consideration. *Ex parte Moberly, re Young*, 2 M. & A. 23.

CONSOLIDATION OF ESTATES.

If Commissioners certify that a consolidation will be beneficial, the assignees need not be served. *Ex parte Smith, re Shaw*, 2 M. & A. 60.

CONTEMPT.

Application for warrant of commitment for disobedience of a four-day order is *ex parte*, and quite of course. *Ex parte Hunt, re Fox*, 1834. 4 Dea. & Chit. 503.

Order for four-day order, towards commitment, must be prayed by petition not motion, and certificate of Registrar of non-conformity should be dated the very day of the application for the short order. *Ex parte Myers, re Sudell*, 1835. 4 Dea. & Chit. 579.

When all is regular, the four-day order to pay, &c., or stand committed, is of course at the office. *Ex parte and re Smith*, 2 M. & A. 213.

A single London Commissioner cannot fine for contempt. *Re v. Faulkner*, 2 M. & A. 311.

CONTRACT.

SEC AGREEMENT—PROTECTED CONTRACTS.

Proof cannot be made by the joint estate against the separate estate, except in case of a fraudulent abstraction from joint funds by one of the partners; and not then, if there had been any waiver of the tortious act by the other partner, so as to reduce it to a matter of contract. *Es*

parte Turner, re Mackenzie, 1833. 4 Dea. & Chit. 169; *S. C.* 1 M. & A. 54.

A commission of bankrupt does not operate as a dissolution of the contract of hiring between the bankrupt and his clerk. If the clerk, being hired for a year, continue in the bankrupt's office after the bankruptcy, and then in the middle of the year, by mutual consent, the contract be rescinded, on the understanding that the clerk is to be paid rateably for his services during the current year, the clerk is not barred by the certificate from recovering all the wages due from the expiration of the year last before the commission up to the time of rescinding, no part of such wages being provable under the commission. The provision in 6 G. 4. c. 16. s. 48. for payment of clerks and servants, makes no difference in this respect. A jury may infer such an understanding from the clerk having continued after the bankruptcy in the bankrupt's office as long as the bankrupt's brother remained there managing the business (as he had also done for a month before the bankruptcy), although, in fact, there was nothing for the clerk to do after the bankruptcy. *Thomas v. Williams*, 1 Ad. & El. 685.

CONVEYANCE.

A bankrupt having a mortgage term, deposits the mortgage deed with a party, by way of equitable mortgage, and afterwards purchases

the equity of redemption:—Held, that the whole of the bankrupt's interest in the property must be sold, and his assignees join in the conveyance to the purchaser. *Ex parte Tuffnell, re Watts*, 1834. 4 Dea. & Chit. 29; S. C. 1 M. & A. 620.

COPIES.

Quare, whether the deposit of the attested copy of a lease amounts to an equitable mortgage. *Ex parte Broadbent, re Borron*, 1834. 4 Dea. & Chit. 3; S. C. 1 M. & A. 635.

No application can be made in the matter of a petition, before an office copy is taken of the affidavit filed in support of it. *Anon.* 1834. 4 Dea. & Chit. 141; S. C. *nom.* *Ex parte* and *re Matthews*, 2 M. & A. 73.

On petition to reverse adjudication, copies of depositions will not be given till hearing. *Ex parte* and *re Smith*, 2 M. & A. 75.

COPYHOLDS.

The copyhold property of an insolvent debtor vests in his assignee by virtue of the assignment under 7 Geo. 4. c. 57. s. 11. without entry on the court rolls. *Doe d. Smith v. Glenfield*, 1 Bing. N. C. 729.

COSTS.

See also BANKRUPT'S LIABILITY FOR COSTS.

On an application by two creditors to the Commissioners to expunge a proof, under the 6 Geo. 4. c. 16. s. 60., the Commissioners have a dis-

cretionary power to adjudge to the creditor whose proof is sought to be expunged, such costs as he may think reasonable, including the costs of the meetings, as well as those of the creditor. And though the Commissioners may have allowed rather too much to the creditor, this will not make the order bad for the whole allowance, but the objecting parties may have the costs taxed. *Ex parte Kirkaldy, re Holt*, 1834. 4 Dea. & Chit. 52; S. C. 1 M. & A. 642.

Costs are always given against any party appearing on a petition, who endeavours to support a case of fraud, whether the costs are prayed or not. *Ex parte Taylor, re Percival*, 1834. 4 Dea. & Chit. 125; S. C. 2 M. & A. 36.

When an order is made on the hearing of a petition, that a party shall pay the costs, this includes the costs of an affidavit filed by the other party, although it was not read on the hearing of the petition. *Ex parte Sidebotham, re Barrington*, 1835. 4 Dea. & Chit. 141; S. C. *nom.* *Ex parte* and *re Barrington*, 2 M. & A. 72.

A bankrupt who has obtained his certificate, loses his privilege as to costs. *Ex parte* and *re Lomas*, 1834. 4 Dea. & Chit. 258; S. C. 1 M. & A. 525.

A letter written some months after the deposit of deeds, acknowledging the purpose for which they were deposited, is a sufficient memorandum in writing, to entitle an equi-

table mortgagee to his costs out of the produce of the sale. *Ex parte Reynolds, re Moore*, 1835. 4 Dea. & Chit. 278; S. C. 2 M. & A. 4.

Where the Commissioners expunged a proof, on the application of the assignees, and the creditor afterwards succeeded on a petition to have it restored, the Court gave him the costs of the petition, as well as of the proceedings before the Commissioners; making it an exception to the general rule, that costs are not given against the decision of the Commissioners. *Ex parte Brooks, re Moore*, 1835. 4 Dea. & Chit. 209; S. C. 2 M. & A. 78.

Reference to the Commissioner to allow, on the taxation of the petitioning creditor's bill of costs, certain expenses incurred before adjudication by parties appointed by the creditors to act for the benefit of the estate. *Ex parte Evans, re Bentley*, 1835. 4 Dea. & Chit. 392.

Although the petitioning creditor is not entitled to an order on the assignees to pay the amount of his costs, before they have received money under the fiat, he is nevertheless entitled to an inquiry, whether any assets have been received by the assignees. *Ex parte Abram, re Dunna*, 1835. 4 Dea. & Chit. 401.

On a petition for the substitution of a debt in lieu of the petitioning creditor's debt, under the 6 Geo. 4. c. 16. s. 18., the costs of the proceeding must be paid by the petitioning creditor, and not out of the bank-

rupt's estate. *Ex parte Hayne, re Jacobs*, 1835. 4 Dea. & Chit. 403.

Petition in paper of day; motion made, on notice, that it might stand over to amend, by adding a party respondent. Party moving must pay costs of all parties served with notice; but, petition not being called on, without costs of the day. *Ex parte Story, re Johnson*, 1834. 4 Dea. & Chit. 504.

Costs come out of estate where equitable mortgagee applies for leave to bid, and also for sale; *secus*, if merely for leave to bid. *Ex parte Berkeley, re Deacon*, 1834. 4 Dea. & Chit. 572.

Costs of preparing a special case form part of the costs of appeal to the Lord Chancellor, and should be taxed by the officer in Chancery. This Court intimated its opinion to that effect accordingly to such officer. *Ex parte Hawley, re Richards*, 1834. 4 Dea. & Chit. 572.

Costs ordered against bankrupt to be set off against those ordered in his favour. *Ex parte Hawley, re Richards*, 1834. 4 Dea. & Chit. 572.

Trustee, under deed of trust, by a former petition, upholding the trust and praying to annul fiat, and failing, but consenting to have the account against him taken on that petition by reference, ordered to pay costs of that petition, and to pay balance in his hands, under trust-deed, to assignees, with interest at 4l. per cent. from date of order of reference, although there was no evi-

dence of interest having been made. Costs of reference to be paid by estate. *Ex parte Harding*, 4 Dea. & Chit. 793.

Leave to surrender after 42d day, where bankrupt not guilty of any misconduct, always given with costs out of estate, though petition do not pray costs: joint fiat having subsequently issued, question, which estate should bear costs, reserved. *Ex parte Smith*, 4 Dea. & Chit 810; *S. C. 2 M. & A. 382.*

Equitable mortgagee is not entitled to costs of defending an extent in aid, or to be excused from paying the deposit on sale. *Ex parte and re Stephens*, 2 M. & A. 31.

Solicitor to fiat must be at any expense which his neglect would cause the estate. *Ex parte Bennett, re Stephens*, 2 M. & A. 308.

In cases of scandal, the costs are as between solicitor and client. *Ex parte Porter, re Robinson*, 2 M. & A. 220.

Commissioner having improperly rejected proof, because claim was merged in felony, the petitioner was allowed costs out of estate. *Ex parte Birks*, 2 M. & A. 208, n. (a).

COSTS OF DAY.

Petition in paper of day, motion made, on notice, that it might stand over to amend, by adding a party respondent. Party moving must pay costs of all parties served with notice, but, petition not being called on, without costs of the day. *Ex parte Story, re Johnson*, 1834. 4 Dea. & Chit. 504.

COUNSEL, AND COUNSEL'S OPINION.

See BARRISTER—PRODUCTION OF DEEDS, &c.

COUNTRY COMMISSIONERS.

See COMMISSIONERS IN COUNTRY.

COURT OF REVIEW.

To consist in future of one chief and two puisne Judges, and Registrars, &c., reduced, 5 & 6 *Will. 4. c. 29. s. 21.*

Power to administer oaths on affidavit, *id. s. 24.*

Declared Court of Record from time of 1 & 2 *Will. 4. id. 25.*

Independently of the provisions in the acts of parliament, the Court of Review has a general jurisdiction to refer the bill of any solicitor of that Court for taxation. *Ex parte Copeland, re Burnard*, 1834. 4 Dea. & Chit. 86.

COVENANT.

Premises were let for 21 years to A., his executors, administrators and assigns, with a proviso that if the lessee, his executors, administrators, or assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him &c., by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him whereby any reasonable probability might arise of the estate being extended &c., the estate should determine and the lessor have power to re-enter. Before

the term ended, the lessee died, and by will bequeathed the premises held under this demise to his executors, on trust for his (testator's) widow. One executor died and the survivor became bankrupt:—Held, that the lessor had a right to re-enter, which he might enforce by ejectment. *Doe dem. Bridgman v. David*, 5 Tyr. 125; S. C. 1 Crom. M. & R. 405.

A lease contained a proviso for re-entry, if the lessee, his "executors or administrators, or either of them," should become bankrupt. The executor of the lessee became bankrupt: Held, that the landlord was entitled to recover in ejectment, although a term vested in a person as executor does not on his bankruptcy pass to the assignee. *Doe dem. Williams v. Davies*, 6 C. & P. 614.

CREDITOR.

See also DEBTOR AND CREDITOR—MEETING OF CREDITORS.

It is a matter of course for any creditor who has proved to the amount of 20*l.* to apply within a reasonable time, under the 14th section of 6 *Geo.* 4. c. 16., for a retaxation of any bill of the solicitor to the commission; but not where a period of three years has been suffered to elapse after payment of such bill. But where the creditor applies to the general jurisdiction of the Court, and points out objectionable items, the Court will then refer the bill to its proper officer, to review the former taxation. Where, however, a bill has been already taxed by the proper

officer of the Court in which the business has been done, the Court of Review will not in such case disturb the taxation. What are objectionable items in the solicitor's bill for business connected with the meetings of the Commissioners? *Ex parte Christy, re Barrow*, 1835. 4 Dea. & Chit. 414.

The drawer of a bill accepted by the bankrupt, but which he had indorsed over, and which was not yet proved against the estate, swore to a deposition in support of the fiat, stating himself therein not to be a creditor:—Held, in the face of that statement, that his deposition could not be rejected on the ground of his being a creditor. But being subsequently examined *videlicet*, and admitting the facts:—Held, that as he might be called on to pay the bill, and would have the option to prove against the estate, he was an interested party, and therefore not examinable. *Ex parte and re Lavender*, 1834. 4 Dea. & Chit. 487.

On petition to stay certificate, it must appear from the petition itself that the party applying is a creditor; if it appear merely inferentially, that is sufficient; if it merely so appear from the affidavits in support, that is insufficient; and no amendment of petition to stay certificate allowed. *Ex parte Robinson, re Case*, 1834. 4 Dea. & Chit. 499.

CROSS-PETITION.

An assignee who has been guilty of misconduct, applies to be dis-

charged, on payment of costs. The Court refused to act on the suggestion of the respondent, that the nature of his misconduct should be stated in the order for his removal, but directed that the order should be without prejudice to any future application against him. *Ex parte Angle, re Smith*, 1834. 4 Dea. & Chit. 118; S. C. 2 M. & A. 38.

A cross-petition by the bankrupt for allowance of the certificate, will not be advanced on motion of course, pending the reference for scandal, of affidavits filed in answer to the petition to stay the certificate, on the ground that the latter petition was improperly served. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Chit. 217.

CRIMINAL CHARGE.

The balance sheet of a bankrupt, given on oath under his commission, is not admissible against him on a criminal charge. *Rex v. Britton*, 1 Moody & Rob. 297.

CUSTODY OF PROCEEDINGS.

The majority of the assignees have a clear right to the custody of the proceedings, unless gross misconduct be shown on a cross-petition for their removal, or an injunction. *Ex parte Holford, re Tate*, 1834. 4 Dea. & Chit. 271; S. C. 2 M. & A. 52.

CUSTOM.

A coal-merchant, at the time of

his bankruptcy, had in his possession barges which bore his own name and number, and were registered in his name under the Waterman's Act. These barges he had hired of defendant, it being the custom for coal-merchants to hire barges, and to paint on them the name of the hirer. Upon a question whether the barges passed to the coal-merchant's assignees under his bankruptcy: — Held, that it was properly left to the jury to find whether the custom to hire was generally notorious in the coal trade; and that it was not necessary to direct them to inquire whether the custom was notorious to the world at large. *Watson v. Peache*, 1 Bing. N. C. 327; S. C. 1 Scott, 149.

DEBTOR AND CREDITOR.

See also CREDITOR.

W. shipped at Leghorn twenty-three casks of oil, on account and by the order of *L.* at Liverpool, and transmitted to him a bill of lading. Before the arrival of the oil, *L.* indorsed the bill of lading, and deposited it with *H.*, who advanced money on it, having previously advanced money on other goods (the property of *L.*) deposited with him. On the arrival of the oil, *L.* having previously become bankrupt, and *W.* not having been paid for it, *W.*'s agents claimed it of the master of the ship; but the latter delivered it to *H.*, who afterwards sold the goods of *L.* as well as the oil of *W.* The net pro-

ceeds of the goods belonging to *L.* were sufficient to satisfy the debt due from *L.* to *H.* *H.* paid himself his debt, and deposited the net proceeds of *W.*'s oil with a third person, to abide the event of the award of an arbitrator, to whom all disputes between *W.* and the assignees of *L.* were referred. The arbitrator having stated the above facts on his award for the opinion of this Court:—Held, that *W.*, the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of *L.*, because the property in and the right to the possession was then vested in *H.*, the indorsee of the bill of lading, for value; and further, that *W.* had not, by reason of such claim, any legal right to the possession of the goods after *H.*'s lien was satisfied: but that in a Court of Equity, such transfer to *H.* would be treated as a pledge or mortgage only, and therefore *W.*, by his attempted stoppage in transitu, acquired a right to the goods in equity, subject to *H.*'s lien against the assignees of *L.*:—Held, secondly, that *W.*, by means of his goods, had become surety to *H.* for *L.*'s debt, and had a clear equity to oblige *H.* to pay his debt out of *L.*'s own goods deposited with him in ease of such surety; and all the goods both of *W.* and *L.* having been sold, *W.* might insist on the proceeds of *L.*'s goods being appropriated to payment of the debt: and, therefore, that *W.* was entitled to have all the proceeds of the oil paid

over to him. *Re the Arbitration between Westzinthus and Assignees of Lapage and Co.: and between Rogers and Co. and the same Assignees*, 5 Barn. & Adol. 817.

A. & B. creditors of a trader, who had committed a secret act of bankruptcy, pressed him for payment, when he offered goods, if a customer could be found. The creditors procured the defendant, to whom they were indebted, to purchase the goods, who with the assent of the trader credited *A. & B.* in account. In assumpsit by the assignees of the trader for the price of these goods, it was held, that if the appropriation of the money to *A. & B.* was merely in consequence of the direction of the trader, it was revocable, and the plaintiffs might recover; but if it was part of the contract that the payment should not be revocable, it was then a question whether this was a payment within the 6 Geo. 4. c. 16. s. 82. which, *semble*, it was not. *Bradbury v. Anderton*, 1 Crompt. Mees. & Ros. 486; S. C. 5 Tyr. 152.

DEBTS.

To assumpsit, by two plaintiffs, for goods sold, &c., defendant pleaded the bankruptcy of one. Replication, that, before the bankruptcy, the bankrupt plaintiff assigned to the other all his interest in the debt, and that the bankrupt now sued only as trustee for his co-plaintiff. The Court was of opinion that the replication was bad, for not stat-

ing that the debtor had had notice of the supposed assignment, although the defendant had pleaded over without alleging the want of notice. But the plaintiff had leave to amend. *Dean v. James*, 1 Ad. & El. 809.

Under the thirtieth section of the Insolvent Debtors' Act (7 G. 4. c. 57.) a debt due to the insolvent will pass to the provisional assignee, although it has been assigned to a third party before the insolvent's imprisonment, if notice of such assignment was not given to the debtor before such imprisonment. *Buck v. Lee*, 1 Ad. & El. 804.

To an action by the assignees of a bankrupt ship-owner for the freight of a voyage to India, accruing to him before his bankruptcy, the defendant pleaded that the ship-owner, before his bankruptcy, assigned by deed the freight in question to I., in trust to discharge a debt due from the ship-owner to I., and to pay the surplus, if any, to the ship-owner; that the defendant had notice of such assignment, and that the freight, which was not sufficient to discharge the debt, had been demanded of him by I.:—Held, a good bar to the action. *Leslie v. Guthrie*, 1 Bing. N. C. 697.

DECISIONS DOUBTED, CONFIRMED, &c.

Ex parte Skinner, Mont. & B. 417; corrected *Ex parte Collyer*, 2 M. & A. 30.

Ex parte Watkins, 1 M. & A. 689; S. C. 4 D. & C. 87; reversed on appeal, S. C. 2 M. & A. 348.

Ex parte Elsee, Mont. 1; overruled *Ex parte Joyner*, 2 M. & A. 1.

The principle of *Ex parte Nottley*, 3 D. & C. 367; S. C. 1 M. & A. 46, confirmed, *Ex parte Gray*, 4 D. & C. 778.

Ex parte Baldwin, 1 M. & A. 617, corrected by *Ex parte and re Thompson*, 4 Dea. & Chit. 534.

DECLARATION OF TRUST.

By the rules of an Insurance Company, no person, except a director, was permitted to hold more than two shares in his own name; but no rule prevented a person from being beneficially entitled to more than two shares, by holding them in the name of another party. The petitioner, who was already the holder of two shares, having purchased two other shares, caused them to be entered in the name of the bankrupt in the Company's books, with the knowledge of one of the directors and the actuary. The bankrupt signed a declaration of trust, that he held the shares as trustee for the petitioner, but no notice of the trust was taken in the books of the Company; and he continued to receive the dividends on the shares, accounting for them from time to time to the petitioner, up to the period of his bankruptcy, when the shares were still standing in his name. Held, that the shares did not pass to his assignees, as being in his order and disposition at the time of his bankruptcy. *Ex parte Watkins, re Kiddier*, 1834. 4 Dea. & Ch. 87; S. C. 1 M. & A. 689.

DEEDS.

See also PRODUCTION OF DEEDS.

A bankrupt conveys his real estate to two trustees upon certain trusts for the payment of his debts, and subsequently enters into an agreement with them as to the sale of the property; after which he takes forcible possession of part of it, and the trustees bring an action of ejectment against him, which, with another action, is referred to the decision of an arbitrator. The award finds, that the creditors were entitled to recover in the action of ejectment, and directs that a sum of money which was due to the trustees for expenses incurred by them in the execution of the trusts shall be paid by instalments, and in default of payment, that the property shall be sold, and the proceeds applied in discharge of the debt due to the trustees:—Held, that the award was no charge upon the land; but that it did not destroy the lien thereon, which the deed had expressly given to the trustees for the expenses incurred by them in the execution of the trusts. *Ex parte Coppard, re Thornton*, 1888. 4 Dea. & Chit. 102.

DELIVERY UP OF SECURITIES.

H. & P., drawers of a bill on and accepted by *P. & Co.*, for 2000*l.*, indorse it to *A.* for his accommodation. *W. & Co.* discount it for *A.* together with another bill drawn by *A.* for 2000*l.* upon and accepted by *S. & Co.* *A. & H.*, and *P. & S. &*

Co. severally become bankrupts. *W. & Co.* receive dividends from *S. & Co.*'s estate 666*l.* 13*s.* 4*d.* on *S. & Co.*'s acceptance; also 750*l.* from *H. & P.*'s estate on the bill drawn by them. They also prove against *A.*'s estate for 888*l.* 6*s.* 8*d.*, as the amount of *H. & P.*'s bill, and balance of *A.*'s bill on *S. & Co.*, after deducting the 666*l.* 13*s.* 4*d.* received from *S. & Co.*, and receive 277*l.* 15*s.* 6½*d.* dividend thereon; 166*l.* 13*s.* 4*d.* being in respect of the proportion of proof on *H. & P.*'s bill. *P. & Co.* stopped payment, and under a composition deed *W. & Co.* receive 1000*l.* in respect of *H. & P.*'s bill of 1916*l.* 13*s.* 4*d.*; balance 68*l.* 6*s.* 8*d.* *Semble*, (*W. & Co.* claiming to have a right to retain *H. & P.*'s bill, in order to work out their remedies against *A.* in respect of *A.*'s bill,) that the assignees of *H. & P.*, although they tendered the balance 88*l.* 6*s.* 8*d.*, could not compel *W. & Co.* to deliver up *H. & P.*'s bill. *Quære*, whether the Court has jurisdiction, on a subject of litigated title such as this. Held, that as *W. & Co.* were not bound to receive the 88*l.* 6*s.* 8*d.*, the petition was premature at all events till the bill was fully paid off. *Ex parte Dickson, re Hutchinson*, 1835. 4 Dea. & Ch. 614.

Quære, if the C. R. has jurisdiction to entertain a petition seeking delivery up of specific chattel. It has, if parties respondent consent to be bound. But respondent being trustee cannot consent. *Ex parte Ellison*, 4 Dea. & Ch. 725.

Bail above not having been put in in time, proceedings were taken on the bail-bond, which were, on the 7th of December, 1832, stayed, on the terms that the bail-bond should stand as a security. At the summer assizes, 1833, the plaintiff obtained a verdict against the principal. After the bail-bond was ordered to stand as a security, the principal became bankrupt, and afterwards the bail also became bankrupt, and their certificates were allowed in July 1833. On motion for having the bail-bond delivered up to be cancelled, and for entering an *exoneretur* on the bail-piece:—Held, that, as the bankruptcy and the validity of the certificates of the bail were not shown to be disputed, the bail were entitled to be relieved, and, though the plaintiff was entitled to keep the bail-bond for the purpose of proving or claiming under the commission, the proceedings thereon were ordered to be stayed. *Slatter v. Scott*, 2 Crompt. & Mees. 475; *S. C.* 4 Tyrw. 372.

DEPOSIT OF DEEDS, &c.

See also MEMORANDUM OF DEPOSIT.

Quære, whether the deposit of the attested copy of a lease amounts to an equitable mortgage. *Ex parte Broadbent, re Borrton*, 1834. 4 Dea. & Ch. 3; *S. C.* 1 M. & A. 635.

G. & Co., to secure a permanent loan from their bankers, *V. & Co.*, to the amount of 20,000*l.*, agree to deposit with them their joint note for that amount; and as collateral secu-

rity, 10,000*l.* in bills not to be moved, and 10,000*l.* in bills to be with *G. & Co.* during the day, and also to leave a standing balance on the account every night of 4000*l.* In pursuance of this agreement, *G. & Co.* every evening delivered to *V. & Co.* bills of various amounts, but not less than 10,000*l.* on any occasion, unless their cash balance exceeded 4000*l.*; and every morning they received these bills back again from *V. & Co.*, which were either returned, or others of equal amount substituted, every evening. On the last day of dealing between the parties, *G. & Co.* informed *V. & Co.*, that as they had drawn out the cash balance, which they ought to have left in their hands, they had given additional security to *V. & Co.*, by lodging bills with them to a larger amount. The amount of the sum so overdrawn was, in fact, 3000*l.*; and the amount of the bills then deposited was 22,666*l.*, including a note of hand of *B. & Co.* for 10,000*l.*, for which *B. & Co.* had only received a partial consideration from *G. & Co.*; but *V. & Co.* had no notice of such want of consideration attaching to this note. At the closing of the account between *G. & Co.* and *V. & Co.*, a balance was due to *V. & Co.* of 35,386*l.*, for which they held the deposit of the bills and note to the amount of 22,666*l.*, besides the note of *G. & Co.* for 20,000*l.* *G. & Co.* afterwards stopped payment, when *V. & Co.* gave them a letter of licence, which was however subsequently re-

called. *B. & Co.* became bankrupt :—Held, that *V. & Co.* were entitled to prove the full amount of the note for 10,000*l.* against *B. & Co.*'s estate; but that as the specified purpose of the deposit of the bills by *G. & Co.* with *V. & Co.* was not to secure any general balance, but merely the two loans of 20,000*l.* and 3000*l.*, the bills deposited were to be considered only as collateral security for those two sums, and not for the amount of the whole debt due to *V. & Co.*; that the proceeds of the other bills and of *G. & Co.*'s joint note must therefore be deducted from the 23,000*l.*; and that *V. & Co.* were entitled to receive dividends on their proof against *B. & Co.*'s estate, until they should have received full payment of the unsatisfied balance of this latter sum. *Ex parte Vere, re Bentley*, 1835. 4 Dea. & Ch. 295; *S. C.* 2 M. & A. 123.

Equitable mortgage may be created by deposit of one of title deeds, where the others were in the hands of depositor's solicitors, but not as equitable mortgagees. *Ex parte Chippendale, re Potter*, 2 M. & A. 299.

DEPOSIT ON SALE.

On the sale of the bankrupt's mortgaged property, the Court, in the order for leave to bid, will not direct that the mortgagee shall not be required to make any deposit. *Ex parte Tatham, re Sheppard*, 1834. 4 Dea. & Ch. 360; *S. C.* 1 M. & A. 335.

Equitable mortgagee is not entitled to costs of defending extent in

aid, or to be excused from paying deposit on sale. *Ex parte and re Stephens*, 2 M. & A. 31.

DEPOSITIONS IN BANKRUPTCY.

See also COPIES OF DEPOSITIONS—

READING DEPOSITIONS.

Depositions of deceased witnesses taken before Commissioners of bankrupt on the opening of a commission, and subsequently inrolled by the assignees pursuant to the 6 Geo. 4. c. 16. s. 96., are not admissible in evidence against the assignees acting under the commission, in an action brought by the bankrupt against such assignees, for the purpose of disputing the validity of the commission. *Chambers v. Bernasconi*, 1 Crom. M. & R. 347.

DEPOSITION OF PROOF.

An affidavit in support of a deposition of proof on a bill must state the consideration. *Ex parte Maberly, re Young*, 2 M. & A. 23.

DETERMINATION OF LEASE.

See LEASE, DETERMINATION OF.

DEVASTAVIT.

The master found, that two executors had, by signing joint cheques, enabled each other to receive sums belonging to the estate of their testatrix, when they were both largely indebted to that estate; and that the sums so received by them were debts proveable under their respective commissions, both executors having be-

come bankrupt:—Held, that interest at 5 per cent., as the consequence of the *devastavit*, was to be added to the principal sums found to be proveable against the bankrupt estates of the executors. *Bick v. Motly*, 2 Mylne & Keen, 312.

DISCHARGE FROM CUSTODY, &c.

On a petition to stay the certificate by a creditor, at whose suit the bankrupt is in custody, the bankrupt must be discharged before the petition can be heard. *Ex parte Green, re Armitstead*, 1834. 4 Dea. & Chit. 112; S. C. 2 M. & A. 31.

A party outlawed on civil process, after judgment, and on his petition subsequently made to the Insolvent Debtors' Court, adjudged to be discharged, is not entitled to a reversal of the outlawry, though the debt on which the outlawry is founded be included in his schedule. *Dickson v. Baker*, 1 Ad. & El. 853.

Semble. The discharge of an insolvent under 7 G. 4. c. 57., applies only to the debts named in the schedule, and not to all the debts due to the creditors named. *Bishop v. Polhill*, 1 Moody & Rob 363.

DISCLAIMER.

A creditor, who becomes bankrupt after proving his debt, may nevertheless petition to stay the first bankrupt's certificate, if the assignees of the creditor do not interfere. *Ex parte Taylor, re Percival*, 1834. 4 Dea. & Ch. 125; S. C. 2 M. & A. 36.

DISMISSAL.

See PETITION, DISMISSAL OF.

DIVIDEND.

See also UNCLAIMED DIVIDEND.

The non-payment of any dividend is not, of itself, a sufficient reason to stay the certificate. *Ex parte Green, re Armitstead*, 1834. 4 Dea. & Chit. 112; S. C. 2 M. & A. 31.

Where a party purchases of a creditor all his right to the dividends and interest on his proof, *semble*, that such party cannot proceed against the assignees by petition for an order to pay to him the dividends on the proof, but must be left to the ordinary means of enforcing the contract by action at law, or suit in equity. *Ex parte Richards, re Trevor*, 1835. 4 Dea. & Ch. 190.

G. & Co. to secure a permanent loan from their bankers, F. & Co., to the amount of 20,000*l.*, agree to deposit with them their joint note for that amount; and as collateral security, 10,000*l.* in bills not to be moved, and 10,000*l.* in bills to be with G. & Co. during the day, and also to leave a standing balance on the account every night of 4000*l.* In pursuance of this agreement, G. & Co. every evening delivered to F. & Co. bills of various amounts, but not less than 10,000*l.* on any occasion, unless their cash balance exceeded 4000*l.*; and every morning they received these bills back again from F. & Co., which were either returned, or others of equal amount substituted, every evening. On the

last day of dealing between the parties, *G. & Co.* informed *V. & Co.* that as they had drawn out the cash balance which they ought to have left in their hands, they had given additional security to *V. & Co.* by lodging bills with them to a larger amount. The amount of the sum so overdrawn was, in fact, 3000*l.*, and the amount of the bills then deposited was 22,666*l.*, including a note of hand of *B. & Co.* for 10,000*l.*, for which *B. & Co.* had only received a partial consideration from *G. & Co.*; but *V. & Co.* had no notice of such want of consideration attaching to this note. At the closing of the business between *G. & Co.* and *V. & Co.*, a balance was due to *V. & Co.* of 35,386*l.*, for which they held the deposit of the bills and note to the amount of 22,666*l.*, besides the note of *G. & Co.* for 20,000*l.* *G. & Co.* afterwards stopped payment, when *V. & Co.* gave them a letter of licence, which was however subsequently recalled. *B. & Co.* became bankrupt:—Held, that *V. & Co.* were entitled to prove the full amount of the note for 10,000*l.* against *B. & Co.*'s estate; but that as the specified purpose of the deposit of the bills by *G. & Co.* with *V. & Co.* was not to secure any general balance, but merely the two loans of 20,000*l.* and 3000*l.*; the bills deposited were to be considered only as collateral security for those two sums, and not for the amount of the whole debt due to *V. & Co.*; that the pro-

ceeds of the other bills and of *G. & Co.*'s joint note must therefore be deducted from the 23,000*l.*; and that *V. & Co.* were entitled to receive dividends on their proof against *B. & Co.*'s estate, until they should have received full payment of the unsatisfied balance of this latter sum. *Ex parte Vere, re Bentley*, 1835. 4 Dea. & Chit. 295; *S. C. 2 M. & A.* 123.

Where the holder of bills, which were deposited with him by the bankrupts as a collateral security for a debt, proved the amount of the balance due, excepting the bills as a security, and some of the bills were afterwards paid in full:—Held, that the amount of the bills so paid must be deducted from the proof, and the dividends calculated only upon the residue of the debt. *Ex parte Brunskill, re Bentley*, 1835. 4 Dea. & Chit. 442; *S. C. 2 M. & A.* 220.

Assignees, on the representation of the solicitor to the commission that he is authorized to receive it as agent, to pay over a dividend to such solicitor. It turns out, he had no such authority. Upon petition of creditor for payment to him of the dividend, charging that no authority was given to that solicitor:—Held, that being solicitor to the commission he might be made respondent as well as the assignees, and that a joint order might be made against them all for its payment. On dividend being withheld, assignees ordered to pay it with five per cent. interest

from time of application to them for payment. *Ex parte Story, re Johnson*, 1834. 4 Dea. & Chit. 504.

One of a double proof made more than six years back, ordered to be expunged, according to *Ex parte Moulton*. But dividends received on the expunged proof more than six years back, cannot be refunded, even though there was no chance of recouping the injured estate out of future dividends from the remaining proof. *Ex parte Soper, re Salter*, 1835. 4 Dea. & Chit. 569.

Where, upon order of dividend, assignees forward to creditor a bill for the amount of his dividend, but creditor rejects it, because he claims more than is offered (namely, full payment, without allowing the assignees a set-off, which they claimed against him, and the amount of which, together with the sum tendered, made up the amount of dividend declared on creditor's proof,) and the proceeds of the bill are received by one assignee, and by him invested at interest:—The creditor was held, after twenty years and upwards, entitled to the fund, and all interest made by it. *Ex parte Holford*, 4 Dea. & Chit. 798; S. C. 2 M. & A. 289.

DOCKET PAPERS.

Fiat amended, by altering the description of one of the petitioning creditors, so as to make it agree with that in the docket papers. *Ex parte Jervis, re Elliott*, 1834. 4 Dea. & Chit. 27; S. C. 1 M. & A. 619.

DOUBLE PROOF.

One of a double proof made more than six years back, ordered to be expunged, according to *Ex parte Moulton*. But dividends received on the expunged proof more than six years back, cannot be refunded, even though there was no chance of recouping the injured estate out of future dividends from the remaining proof. *Ex parte Soper, re Salter*, 1835. 4 Dea. & Chit. 569.

EFFECT OF BANKRUPTCY.

See BANKRUPTCY, EFFECT OF.

EFFECT OF PROOF.

See PROOF, EFFECT OF.

ELECTION.

On the formation of a partnership between *A.* and *B.*, *A.* lends to *B.*, *B.*'s proportion of the capital, and *A.* is to receive it again, and interest thereon, out of *B.*'s share of the profits. *B.* assigns property to *C.* in trust to secure to *A.* the money lent by him, and covenants to pay *C.* the amount. After an act of bankruptcy by *B.*, known to *A.*, *A.* files a bill for a dissolution and account of partnership and for payment of the debt:—Held, that *A.* and *C.* could not, after such election, sue out a fiat against *B.* founded on that debt, *A.* having elected his remedy and treated the debt as mixed up with the partnership accounts. *Ex parte and re Gray*, 4 Dea. & Chit. 778; S. C. 2 M. & A. 283.

An entry in a bankrupt's examination of a certain sum being due to *A.*, is evidence of an account stated between them, and is a sufficient acknowledgment to take the case out of the statute of limitations. But in an action by an attorney for business done, for which no signed bills had been delivered in pursuance of the statute, an admission by the defendant, in an examination before the Commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated. The plaintiff, after being nonsuited, took out a fiat in bankruptcy against the defendant:—The Court refused to allow the proceedings to be stayed without costs, on a suggestion that the case was within the 6 *Geo.* 4. c. 16. s. 59. *Eike v. Nokes*, 4 M. & S. 585; S. C. 1 Moody, 359.

EQUITABLE MORTGAGE.

A. deposits with *B.*, as a security for the repayment of a loan of money, the attested copy of the lease of a coal mine granted to *A.* and four other persons, as tenants in common. The mine was worked by them according to the stipulations of certain articles of partnership, which contained a proviso, that if any one partner wished to dispose of his share the others should have a right of preemption:—Held, (Sir *J. Cross, dissent.*,) that the usual order could not be made for the sale of *A.*'s share in this property, as in

the ordinary case of an equitable mortgage, it being necessary that the partnership accounts should first be taken, for the purpose of ascertaining *A.*'s share in the property, which this Court had no jurisdiction to do, the other partners not being before the Court. *Ex parte Broadbent, re Borron*, 1834. 4 Dea. & Ch. 3; S. C. 1 M. & A. 635.

Quere, whether the deposit of the attested copy of a lease amounts to an equitable mortgage? *Ex parte Broadbent, re Borron*, 1834. 4 Dea. & Chit. 3; S. C. 1 M. & A. 635.

A bankrupt having a mortgage term, deposits the mortgage deed with a party by way of equitable mortgage, and afterwards purchases the equity of redemption:—Held, that the whole of the bankrupt's interest in the property must be sold, and his assignees join in the conveyance to the purchaser. *Ex parte Tuffnell, re Watts*, 1834. 4 Dea. & Chit. 29; S. C. 1 M. & A. 620.

On a deposit of a policy of assurance by way of equitable mortgage, the onus does not lie on the mortgagee, to show that notice of the deposit was given to the office before the act of bankruptcy,—but with the assignees, to show that it was not. *Ex parte and re Stevens*, 1834. 4 Dea. & Chit. 117.

A bankrupt deposits with the petitioner, by way of equitable mortgage, an assignment, which had been made to the bankrupt, of a reversionary interest under a will; no

notice of the assignment having been given to the executors either by the bankrupt or by the petitioner:—Held, that the property was not within the order and disposition of the bankrupt as reputed owner. *Ex parte Newton, re Gore, 1834.* 4 Dea. & Chit. 138; *S. C.* 2 M. & A. 51.

A bankrupt being the owner as well as occupier of a freehold cotton mill, gave the petitioner an equitable mortgage on it, "together with the steam engines, and also all and singular other the moveable and fixed machinery and steam pipes then in, upon, about, and belonging to the said steam-mill and premises, or occupied or used therewith;" and the bankrupt continued in possession of the mill and fixtures up to the period of his bankruptcy. Held, that all parts of the machinery and fixtures, which were so attached to the premises as to be legally affixed to the freehold, were not to be considered as goods and chattels within the 72d section of the Bankrupt Act, and that the assignees had no right to them, as against the equitable mortgagee. *Ex parte Wilson, re Butterworth, 1835.* 4 Dea. & Ch. 143; *S. C.* 2 M. & A. 61.

Where property pledged by the bankrupt with a creditor is claimed by a third person, the creditor may enter a claim on the proceedings for the whole of his debt, till the legal right to the property is determined. *Ex parte Williams, re Raikes, 1835.* 4 Dea. & Chit. 180.

The Court will not interfere in making an order for the sale of mortgaged property, where the circumstances are suspicious, as to the mortgage being a fraudulent preference. *Ex parte Dredney, re Davy, 1835.* 4 Dea. & Ch. 181; *S. C.* 2 M. & A. 72.

Where there has been an order made for the sale of mortgaged property, and the sale is afterwards deferred, the mortgagee is entitled to apply the rents and profits in reduction of the interest accruing subsequent to the order of sale and up to the time of taking the account. *Ex parte Ramsbottom, re Penfold, 1835.* 4 Dea. & Ch. 198; *S. C.* 2 M. & A. 79.

In general an equitable mortgagee is not entitled to the rents, &c. prior to the date of the order for sale. But where, prior to the bankruptcy, the mortgagor absconds, and the equitable mortgagee of part of the property takes possession of that part by an agent, and a fiat issues against the mortgagor, and then the solicitor to the commission, on behalf of the creditors, and the equitable mortgagee, jointly, appoint the same agent to manage the whole property, which agent is subsequently adopted by the assignees:—Held, the mortgagee, though he was also petitioning creditor, was entitled to the rents, &c. from the time of his first taking possession. *Ex parte Bignold, re Postle, 1834.* 4 Dea. & Ch. 259; *S. C.* 2 M. & A. 16, 214.

A letter written some months

after the deposit of deeds, acknowledging the purpose for which they were deposited, is a sufficient memorandum in writing, to entitle an equitable mortgagee to his costs out of the produce of the sale. *Ex parte Reynolds, re Moore*, 1835. 4 Dea. & Chit. 278; S. C. 2 M. & A. 104.

Costs come out of estate where equitable mortgagee applies for leave to bid, and also for sale; *secus*, if merely for leave to bid. *Ex parte Berkeley, re Deacon*, 1834. 4 Dea. & Chit. 572.

Usual order for sale of equitable mortgage made, notwithstanding argument that there being no deposit of deeds, the agreement was a mere executory agreement for a mortgage, and gave no lien on the property. *Ex parte Jones*, 4 Dea. & Chit. 750.

Where the owner of shares in an insurance company transfers them by way of equitable mortgage, though he does not observe the rules of the company in regard to the mode of transfer, and though he continues to act as director without having any other shares than those assigned (the being a shareholder to a certain extent alone entitling him so to act), yet if the transferree gives notice to the company of his mortgage, and the owner becomes bankrupt, they are taken out of his order and disposition; especially where the company make entry of the notice in their books in such a manner as to evince their knowledge that such owner could not further dispose of the shares. Bare

notice in such cases seems sufficient. *Ex parte Masterman*, 4 Dea. & Ch. 751; S. C. 2 M. & A. 209.

Equitable mortgage may be created by deposit of one of the title deeds, where the others are in the hands of the depositor's solicitors, but not as equitable mortgagees. *Ex parte Chippendale, re Potter*, 2 M. & A. 299.

Creditor who has a deposit of goods for his debt and interest, and who at the request of the assignees delays the sale for a better market, and afterwards sells, may apply the proceeds in reduction of the interest accrued due since the sale. *Ex parte Kensington, re Lancaster*, 2 M. & A. 200.

Court will only interfere to order sale of equitable mortgage where there is no dispute. Legal mortgage of equitable estate is within Lord Loughborough's Order. *Ex parte Attwood, re Spooner*, 2 M. & A. 24.

Equitable mortgagee is not entitled to costs of defending an extent in aid, or to be excused from paying the deposit on sale. *Ex parte and re Stephens*, 2 M. & A. 31.

EQUITY OF REDEMPTION.

Specific performance of sale under Lord Loughborough's Order decreed by this Court, although the following objections were urged: viz. 1st. That particulars of sale did not state that sale took place under order of Court; it appearing that purchaser must have known the fact that it was so. 2d. That a third mortgagee of equity of

redemption, and an assignee on prior insolvency of bankrupt, were not parties. 3d. Though the petitioning creditor's debt on which this fiat was founded was contained in the schedule in prior insolvency, especially as the purchaser was presumed to have known of all the objections to the title, and was held to have waived them by granting a lease of the premises purchased by him before the title to him was completed. *Quære*, whether this Court has jurisdiction to direct specific performance of contract of purchase of bankrupt's property, where the purchaser did not know, and had no means of knowing, that the sale took place under order of this Court or of Commissioners? *Ex parte Sidebotham*, 4 Dea. & Chit. 693; S. C. 2 M. & A. 146.

EVIDENCE.

See also AFFIDAVIT—DEPOSITIONS—EXAMINATIONS—FURTHER EVIDENCE—ONUS PROBANDI.

Special order as to the allowance of a bankrupt's certificate, where the signature of one of the creditors had been affixed to it under a power of attorney, and there was no affidavit of the execution of the power of attorney. *Ex parte* and *re Dunstan*, 1834. 4 Dea. & Chit. 30; S. C. 1 M. & A. 619.

On a petition by assignees disputing the right of a creditor to a lien on certain property of the bankrupt, the examination of the bankrupt's clerk, taken by the Commissioners

behind the creditor's back, is not receivable in evidence. *Ex parte Dobson, re Thompson*, 1834. 4 Dea. & Chit. 69; S. C. 1 M. & A. 666.

When an order is made on the hearing of a petition, that a party shall pay the costs, this includes the costs of an affidavit filed by the other party, although it was not read on the hearing of the petition. *Ex parte Sidebotham, re Barrington*, 1835. 4 Dea. & Chit. 141; S. C. *nom. Ex parte* and *re Barrington*, 2 M. & A. 72.

On petition by assignees to expunge a proof, the examination of the bankrupt before the Commissioner, taken at the time the proof was admitted, is receivable in evidence. *Ex parte Freeman, re Clay*, 1835. 4 Dea. & Chit. 404.

Annuity given by father on daughter's marriage, by a letter to the intended husband in these words, viz. "I promise to you, until it is convenient to me to do something better for you, to allow to my daughter 100*l.* a-year, which you can have as you may require:"—Held, to be an annuity during the joint lives of the father and daughter; and though incapable of valuation, and though no other evidence of the genuineness of the letter, held to be provable. *Sir J. Cross, dissent.*, upon the ground that the facts required further investigation. *Ex parte Annandale, re Curtis*, 1834. 4 Dea. & Chit. 511.

The Court has no jurisdiction to control the discretion of a Commis-

sioner as to what documentary evidence he shall require to be produced to prove an act of bankruptcy. But the Court intimated its opinion, that a letter written by the bankrupt's wife to a third party, in whose possession it remained, though it could not in any way afford direct evidence of the act of bankruptcy, (unless it was also proved that she was authorized by her husband to write it as his agent,) she not being examinable as a witness upon that point, yet might be ordered to be produced, to be used only as a clue to the procurement of other evidence as to the act of bankruptcy. *Ex parte Groom, re Chambers, 1835.* 4 Dea. & Chit. 640.

If, in trover by the assignee of a bankrupt, the plaintiff's title as assignee be put in issue, the fiat of bankruptcy inrolled, the certificate of the appointment of the plaintiff as assignee inrolled, and the appointment itself also inrolled, are sufficient proof that the plaintiff is assignee. *Scott v. Thomas, 6 C. & P. 611.*

The balance sheet of a bankrupt, given on oath under his commission, is not admissible against him on a criminal charge. *Rex v. Britton, 1 Moody & Rob. 297.*

The declarations of the petitioning creditor (since dead) made after the commission, are not evidence against the assignees, in an issue to try whether the commission was concerted between the petitioning creditor, the bankrupt, and the attorney. *Harwood v. Keys, 1 Moody & Rob. 204.*

The declarations of a trader made shortly after an absence, are not admissible to prove such absence an act of bankruptcy. *Semble, That a breach of an appointment by a trader to call at his creditor's house to pay a debt, is not an act of bankruptcy. Lees v. Marton, 1 Moody & Rob. 210.*

Depositions of deceased witnesses taken before Commissioners of bankrupt on the opening of a commission, and subsequently inrolled by the assignees pursuant to the 6 Geo. 4. c. 16. s. 96., are not admissible in evidence against the assignees acting under the commission, in an action brought by the bankrupt against such assignees, for the purpose of disputing the validity of the commission. *Chambers v. Bernasconi, 1 Crom. M. & R. 347.*

An entry in a bankrupt's examination of a certain sum being due to A., is evidence of an account stated between them, and is a sufficient acknowledgment to take the case out of the statute of limitations. But in an action by an attorney for business done, for which no signed bills had been delivered, in pursuance of the statute, an admission by the defendant, in an examination before the Commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated. The plaintiff, after being nonsuited, took out a fiat in bankruptcy against the defendant:—The Court refused

to allow the proceedings to be stayed without costs, on a suggestion that the case was within the 6 Geo. 4. c. 16. s. 59. *Eicke v. Nokes*, 4 M. & S. 585; S. C. 1 Moody, 659.

A written statement made by a bankrupt, before his bankruptcy, of his debts and credits, is evidence as showing that he knew of his own insolvency. *Scott v. Thomas*, 6 C. & P. 611:

A trader, in embarrassed circumstances, absented himself from his house from the 16th of February till the 9th of March. Upon an issue, whether he had committed an act of bankruptcy on or before the 5th of March, two letters written by him on the 16th January preceding, asking for time on two bills of exchange payable by him in February, were received in evidence to show the motive of his absence. *Smith v. Cramer*, 1 Scott, 541; S. C. 1 Bing. N. C. 585.

In trover by a bankrupt against his assignees to try the validity of the commission:—Held, that secondary evidence of the assignment might be given, after proving that it was lost before it was entered of record, as directed by 6 Geo. 4. c. 16. s. 96., and 2 & 3 W. 4. c. 114. s. 7. *Semble*, proof of the plaintiff's acquiescence in the defendant's acts as assignee, and dealing with him in that character, would render proof of the assignment unnecessary. *Giles v. Smith*, 5 Tyr. 15; S. C. 1 Cröm. M. & R. 462.

In an action by assignees of a bankrupt for goods sold and delivered by the bankrupt before his bankruptcy, the plea denied their title as assignees, and a notice to dispute the trading &c. was given, pursuant to 6 Geo. 4. c. 16. s. 90. Letters from the defendant to one of the assignees, and to the solicitor to the commission, deprecating proceedings against him, are *prima facie* evidence in admission of the plaintiff's title to sue as assignees, without the regular proof of the bankruptcy. *Ingis v. Spence*, 5 Tyr. 8; S. C. 1 Cröm. M. & R. 482.

In trespass, defendants, after alleging that *M.* had been declared a bankrupt, and that they had been appointed his assignees, justified taking goods as belonging to them in their capacity of assignees: plaintiff replied that the goods belonged to him and not to defendants:—Held, that upon this issue it was not incumbent on defendants to give formal proof of *M.*'s bankruptcy and their appointment as assignees. *Jones v. Brown*, 1 Bing. N. C. 484; S. C. 1 Scott, 453.

Where a new petitioning creditor's debt has been substituted under the stat. 6 Geo. 4. c. 16. s. 18. it is sufficient to prove the petition to the Chancellor, for the substitution of the new debt—the Chancellor's order referring the sufficiency of the debt, &c. to the Commissioner—and the finding of the Commissioner thereon. It is not necessary to produce the Chancellor's order confirming such

finding. *Batchelor v. Vyse*, 1 Moody & Rob. 331.

F., a merchant at Liverpool, used to consign goods to his agent at Bahia, in South America, for sale, and to draw bills upon the credit of and against such consignments, in proportion to their amount, to be paid by the agent out of the proceeds. Some bills so drawn, and negotiated by the indorsements of a house in London with which *F.* corresponded, were refused acceptance by the agent. The London house thereupon requested *F.* to write to his agent at Bahia, with orders, "that in case he did not pay *F.*'s drafts, he should immediately hand over such property as he might have of *F.*'s, of an equivalent value to the bills not paid by him, to the agent of the London house at Bahia." *F.* replied, that he would write to his agent, agreeably to these injunctions, directing him to hand over to the agent of the London house, "property of *F.* in his hands, to cover the amount of bills that eventually might not be paid." Afterwards, and before the letter from *F.* to his agent reached Bahia, *F.* became bankrupt. *F.*'s agent subsequently handed over to the London house goods consigned to him as above mentioned, to an amount less than that of the bills unpaid:—Held, that there was no legal or equitable assignment of those goods to the London house before the bankruptcy, and that on that event the property in them vested in

the assignees. In an action of trover brought by the assignees for the goods, in which the above facts were proved, the defendants also offered in evidence the letter written by *F.* to his agent at Bahia (after promising the London house to write, as above stated), in which he ordered that party to hand over all the property which he held on *F.*'s account to the agents of the London house: *Quære*, Whether the letter was admissible; but held, that if it were, the decision ought still to be the same. *Burn v. Cartallo*, 1 Adol. & Ellis, 886.

EXAMINATION.

See also BANKRUPT'S EXAMINATION.

On a petition by assignees disputing the right of a creditor to a lien on certain property of the bankrupt, the examination of the bankrupt's clerk, taken by the Commissioners behind the creditor's back, is not receivable in evidence. *Ex parte Dobson, re Thompson*, 1834. 4 Dea. & Chit. 69; S. C. 1 M. & A. 666.

EXAMINATION, VIVA VOCE.

Where no sufficient advantage will be gained by a *viva voce* examination, the Court will not, after a petition has been opened, and the petitioner has filed affidavits in reply, order the petition to stand over, on his application for that purpose. *Ex parte Jarman, re Theed*, 1835. 4 Dea. & Chit. 393; S. C. 2 M. & A. 119.

Where petitioner files no affidavits in support, but two days be-

fore hearing served notice to examine witnesses on respondent 20 miles from London, Court refused application of respondent to postpone hearing, so as to procure witnesses in answer, till after petitioners' witnesses were examined. *Ex parte* and *re Lavender*, 1834. 4 Dea. & Chit. 485.

Upon *prima facie* case, *vivâ voce* examination ordered, and advertisement of adjudication postponed. *Ex parte* and *re Lavender*, 1834. 4 Dea. & Chit. 486.

On consent of all parties a *vivâ voce* examination will be ordered in any stage of proceedings. If affidavits have been filed on both sides, (in the absence of consent,) the Court will first hear the affidavits read, and then, if it thinks fit, will order a *vivâ voce* examination. If one party has not relied on affidavits, he, on a proper case made by motion and affidavit, may obtain such examination. *Vivâ voce* examination ordered under circumstances of this case. *Ex parte Dugard, re Aughtie*, 1835. 4 Dea. & Chit. 521.

Seemle, that a petitioner, who is also assignee, and is proposed to be examined as a witness by the respondents, is excepted from the general rule for excluding witnesses during *vivâ voce* examination. *Ex parte Dugard, re Aughtie*, 1835. 4 Dea. & Chit. 524.

There is no rule, that in order to obtain a *vivâ voce* examination after a case has been heard on affidavit,

such examination must have been asked for before the case was gone into. (*Ex parte Baldwin*, 1 M. & A. 617, corrected.) *Ex parte* and *re Thompson*, 1834. 4 Dea. & Chit. 534.

EXCLUDING WITNESSES.

Seemle, that a petitioner, who is also assignee, and is proposed to be examined as a witness by the respondents, is excepted from the general rule for excluding witnesses during *vivâ voce* examination. *Ex parte Dugard, re Aughtie*, 1835. 4 Dea. & Chit. 524.

EXECUTOR.

See also BANKRUPT EXECUTOR.

An executor may prove against a bankrupt co-executor, without an order for that purpose. *Ex parte Courtney, re Davis*, 1835. 4 Dea. & Chit. 456; S. C. 2 M. & A. 227.

Lease for 21 years to *A. B.*, his executors, administrators and assigns. Proviso, that if *A. B.*, his executors, administrators or assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him &c., by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him, whereby any reasonable probability might arise of the estate being extended &c., the estate should determine and the lessor have power to re-enter. *A. B.* died during the term, and by his will devised the premises to his executors on certain trusts.

The surviving executor having become bankrupt :—Held, that the lessor's right of re-entering thereupon accrued. *Doe dem. Bridgman v. David*, 1 Crom. M. & R. 405 ; S. C. 5 Tyr. 125.

A lease contained a proviso for re-entry, if the lessee, his "executors or administrators, or either of them," should become bankrupt. The executor of the lessee became bankrupt : Held, that the landlord was entitled to recover in ejectment, although a term vested in a person as executor does not on his bankruptcy pass to the assignee. *Doe dem. Williams v. Davies*, 6 C. & P. 614.

The Master found, that two executors had, by signing joint cheques, enabled each other to receive sums belonging to the estate of their testatrix, when they were both largely indebted to that estate ; and that the sums so received by them were debts proveable under their respective commissions, both executors having become bankrupt :—Held, that interest at 5*l.* per cent., as the consequence of the *devastavit*, was to be added to the principal sums found to be proveable against the bankrupt estates of the executors. *Bick v. Motly*, 2 Mylne & Keen, 312.

EX PARTE MOTION, &c.

See PETITION, EX PARTE.

Where a fiat has not been filed, the Court, on an *ex parte* application of another creditor, will not order it to be annulled, but merely that the

creditor may issue a new fiat. *Ex parte Gerothwohl, re Wertheim*, 1834. 4 Dea. & Chit. 48.

EXPUNGING PROOF.

See PETITION TO EXPUNGE—PROOF EXPUNGING.

EXTENT IN AID.

Equitable mortgagee is not entitled to costs of defending an extent in aid, or to be excused from paying the deposit on sale. *Ex parte and re Stephens*, 2 M. & A. 31.

FEEES.

The fees payable under 1 & 2 Will. 4. c. 56. ss. 45 & 46. to the secretary of bankrupts, not dispensed with, where a country fiat was annulled because Commissioners declined to act, and a new fiat was proposed to be taken out in London in lieu of it. *In re Willman*, 4 Dea. & Chit. 810 ; S. C. 2 M. & A. 292.

FELONY.

See also CRIMINAL CHARGE.

The bankrupt had two agents, one at Glasgow, the other at Edinburgh. *A.* pays to the Glasgow agent a sum in bank-notes, for the purpose of being remitted to London, which the Glasgow agent transmits for that purpose in a parcel to the Edinburgh agent, from whom the notes are stolen by his clerk the day after the parcel is delivered, and a few days before a fiat is issued against the bankrupt :—Held, that *A.* had no claim to recover

the value of the notes from the assignees. *Ex parte Watson, re Ma-berly*, 1834. 4 Dea. & Chit. 45; S. C. 1 M. & A. 685.

Commissioner having improperly rejected proof, because claim was merged in felony, the petitioner was allowed costs out of estate. *Ex parte Birks*, 2 M. & A. 208, n. (a).

FIAT GENERALLY.

See SECOND FIAT—RENEWED FIAT.

FIAT AMENDING.

Fiat amended, by altering the description of one of the petitioning creditors, so as to make it agree with that in the docket papers. *Ex parte Jervis, re Elliott*, 1834. 4 Dea. & Chit. 27; S. C. 1 M. & A. 619.

The Court will not, on the application of the petitioning creditor, alter the date of the fiat to a later day, to give him more time to prove the act of bankruptcy. *Re Jacob*, 1835. 4 Dea. & Chit. 277; S. C. 2 M. & A. 102.

Fiat unopened. Description of bankrupt's parish allowed to be amended. *Re Humphrey*, 1834. 4 Dea. & Chit. 484.

Annulling and Superseding generally.

See also PETITION TO ANNUL, &c.

Semble, that a power of attorney to transact any business in the Courts of Law, authorizes the attorney to apply for a supersedeas. *Ex parte and re Crowther*, 1834. 4 Dea. & Chit. 31.

Where a fiat has not been filed, the Court, on an ex parte application of another creditor, will not order it to be annulled, but merely that the creditor may issue a new fiat. *Ex parte Gerothwohl, re Wertheim*, 1834. 4 Dea. & Chit. 48.

After repeated acts of acquiescence of the bankrupt in the validity of a commission, and the dismissal of a former petition by him to the Lord Chancellor to supersede it, the Court will restrain him from bringing actions against his assignees. *Ex parte White, re Britten*, 1835. 4 Dea. & Ch. 279; S. C. 2 M. & A. 104.

Upon very slight circumstances of acquiescence, and where the bankrupt has lain by for twenty-two years without taking any active steps to upset the commission, this Court will, upon petition of assignees and a purchaser under the commission, grant an injunction to restrain actions commenced by the bankrupt against purchasers under the commission. *Ex parte Davy, re Chambers*, 1834. 4 Dea. & Ch. 322; S. C. 1 M. & A. 283.

Where the time for opening a fiat expires, and a second is then issued by another party, it is no ground for superseding the second, that it did not issue until after the first was actually opened, unless the party issuing the second knew that fact, or was guilty of some fraud. *Ex parte Westall, re Fletcher*, 1834. 4 Dea. & Chit. 350.

Where a commission issued in

1823, under which the bankrupt never obtained his certificate, and a fiat issued against him in 1832, the Court refused, under the circumstances, to supersede the fiat. *Ex parte Devas, re Kenton*, 1834. 4 Dea. & Chit. 366; S. C. 1 M. & A. 420.

The fees payable under 1 & 2 Will. 4. c. 56. ss. 45 & 46. to the secretary of bankrupts, not dispensed with where a country fiat was annulled because Commissioners declined to act, and a new fiat was proposed to be taken out in London in lieu of it. *In re Willman*, 4 Dea. & Chit. 810; S. C. 2 M. & A. 292.

The Lord Chancellor's jurisdiction to annul a fiat still subsists. *Re Chambers*, 1835. 4 Dea. & Chit. 578.

Although a fiat is fraudulently sued out, yet a creditor, whose debt is impeachable on the ground of usury, cannot petition to supersede it. *Ex parte Jarman, re Theed*, 1835. 4 Dea. & Chit. 393; S. C. 2 M. & A. 119.

Where time for opening town fiat is nearly run out, Court will not, at instance of petitioning creditor, supersede it, and issue a country fiat for alleged convenience of creditors. *Ex parte Bell, re Riley*, 1834. 4 Dea. & Chit. 481.

Fiat will not be superseded on consent under the composition clauses (6 Geo. 4. c. 16. s. 133, 134.) until after the second meeting. *Ex parte Boardman*, 4 Dea. & Chit. 724; S. C. 2 M. & A. 209.

A., as assignee of *B.*, a bankrupt, gave an undertaking to *C.*, who was the mortgagee of one farm, and was under a contract to purchase another farm, both the property of the bankrupt, and who had a distress upon the mortgaged premises, that if the distress were withdrawn he would pay to *C.* the arrears then due in respect of the mortgage, out of the effects on the premises. *C.* withdrew the distress accordingly, and afterwards the bankruptcy was annulled before *A.* had obtained possession of any part of the bankrupt's effects; whereupon *C.* brought an action on the undertaking, and recovered judgment against *A.* personally:—Held, on a bill filed by *A.* against *C.*, to which *B.* was no party, that *A.* could have no relief in equity against the judgment at law; and that he was not entitled, as against *C.*, to claim repayment of the sum thereby recovered out of the price which *C.* had contracted to pay for the other farm. *Pell v. Stephens*, 2 M. & K. 334.

Although no evidence of trading on proceedings, fiat will not be superseded if bankrupt admitted to petitioning creditor that he was a trader. *Ex parte and re Bailey*, 2 M. & A. 86.

An entry in a bankrupt's examination of a certain sum being due to *A.*, is evidence of an account stated between them, and is a sufficient acknowledgment to take the case out of the statute of limitations.

But in an action by an attorney for business done, for which no signed bills had been delivered in pursuance of the statute, an admission by the defendant, in an examination before the Commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated. The plaintiff, after being nonsuited, took out a fiat in bankruptcy against the defendant:—The Court refused to allow the proceedings to be stayed without costs, on a suggestion that the case was within the 6 *Geo.* 4. c. 16. s. 59. *Eicke v. Nokes*, 4 M. & S. 585; S. C. 1 Moody, 359.

Supersedeas on Composition Clause.

Where the bankrupt petitioned for a supersedeas, under the composition contract clause, in the 6 *Geo.* 4. c. 16., and the Commissioner had certified that all the requisites of the statute had been complied with, and stated the amount of the debts proved to the amount of 20*l.*, the number of the creditors who had proved, and the number and value of the creditors who consented, the Court made the order, notwithstanding the Commissioners had omitted to state precisely the exact fractional proportion, under Lord Eldon's General Order. *Ex parte Hinton, re Hinton*, 1834. 4 Dea. & Ch. 351; S. C. 2 M. & A. 361.

Supersedeas on Consent.

On a petition for a supersedeas, with consent of creditors, where one of the creditors could not be found, an order was made for the supersedeas, the petitioner undertaking to pay into Court the amount of the debt of the outstanding creditor. *Ex parte and re Crowther*, 1834. 4 Dea. & Ch. 31.

Where the bankrupt petitions for a supersedeas, with the consent of creditors, and it appears that the Commissioners have adjourned his last examination *sine die*, the Court will not supersede without knowing the reason of such adjournment. *Ex parte Gudge, re Gudge*, 1834. 4 Dea. & Ch. 358; S. C. 1 M. & A. 341.

Semble, this Court has no jurisdiction to order the Commissioner to certify the consent of creditors to a supersedeas, especially when he objects because fees payable under 1 & 2 *Will.* 4. c. 56. ss. 45, 46. are not paid. *Re Hawker*, 1834. 4 Dea. & Chit. 569.

Filing.

Where a fiat has not been filed, the Court, on an *ex parte* application of another creditor, will not order it to be annulled, but merely that the creditor may issue a new fiat. *Ex parte Gerothwohl, re Wertheim*, 1834. 4 Dea. & Ch. 48.

Impounding.

If a fiat is impounded on the

application of *A.*, a petition for its delivery out presented by *B.* must be served on *A.* *Ex parte Martin, re Kenton*, 2 M. & A. 293.

Issuing.

The fees payable under 1 & 2 Will. 4. c. 56. ss. 45 & 46., to the secretary of bankrupts, not dispensed with where a country fiat was annulled because Commissioners declined to act, and a new fiat was proposed to be taken out in London in lieu of it. *In re Willman*, 4 Dea. & Ch. 810; S. C. 2 M. & A. 292.

Opening.

Where the time for opening a fiat expires, and a second is then issued by another party, it is no ground for superseding the second, that it did not issue until after the first was actually opened, unless the party issuing the second knew that fact, or was guilty of some fraud. *Ex parte Westall, re Fletcher*, 1834. 4 Dea. & Ch. 350.

Where time for opening town fiat is nearly run out, Court will not, at instance of petitioning creditor, supersede it, and issue a country fiat for alleged convenience of creditors. *Ex parte Bell, re Riley*, 1834. 4 Dea. & Ch. 481.

Validity of.

Semble, that when a fiat is issued against a trader who has no property, it ought at least to appear that there was some prospect of recovering

property by means of the fiat. *Ex parte Taylor, re Percival*, 1834. 4 Dea. & Ch. 125; S. C. 2 M. & A. 36.

In trespass, defendants, after alleging that *M.* had been declared a bankrupt, and that they had been appointed his assignees, justified taking goods as belonging to them in their capacity of assignees: plaintiff replied that the goods belonged to him and not to defendants:—Held, that upon this issue it was not incumbent on defendants to give formal proof of *M.*'s bankruptcy and their appointment as assignees. *Jones v. Brown*, 1 Bing. N. C. 484; S. C. 1 Scott, 453.

In an action by assignees of a bankrupt for goods sold and delivered by the bankrupt before his bankruptcy, the plea denied their title as assignees, and a notice to dispute the trading, &c. was given, pursuant to 6 Geo. 4. c. 16. s. 90. Letters from the defendant to one of the assignees, and to the solicitor to the commission, deprecating proceedings against him, are *prima facie* evidence in admission of the plaintiff's title to sue as assignees, without the regular proof of the bankruptcy. *Inglis v. Spence*, 5 Tyr. 8; S. C. 1 Crom. M. & R. 432.

In trover by a bankrupt against his assignees to try the validity of the commission:—Held, that secondary evidence of the assignment might be given after proving that it was lost before it was entered of record, as directed by 6 Geo. 4. c. 16. s. 96., and 2 & 3 Will. 4. c. 114. s. 7. *Semble*, proof of the plaintiff's acqui-

escence in the defendant's acts as assignee, and dealing with him in that character, would render proof of the assignment unnecessary. *Giles v. Smith*, 5 Tyr. 15 ; S. C. 1 Crom. M. & R. 462.

Depositions of deceased witnesses taken before Commissioners of bankrupt on the opening of a commission, and subsequently inrolled by the assignees pursuant to the 6 Geo. 4. c. 16. s. 96., are not admissible in evidence against the assignees acting under the commission, in an action brought by the bankrupt against such assignees, for the purpose of disputing the validity of the commission. *Chambers v. Bernasconi*, 1 Crom. M. & R. 347.

Where a new petitioning creditor's debt has been substituted under the stat. 6 Geo. 4. c. 16. s. 18., it is sufficient to prove the petition to the Chancellor, for the substitution of the new debt—the Chancellor's order referring the sufficiency of the debt, &c. to the Commissioner—and the finding of the Commissioner thereon. It is not necessary to produce the Chancellor's order confirming such finding. *Batchelor v. Vyse*, 1 Moody & Rob. 331.

The declarations of the petitioning creditor (since dead) made after the commission, are not evidence against the assignees, in an issue to try whether the commission was concerted between the petitioning creditor, the bankrupt, and the attorney. *Harwood v. Keys*, 1 Moody & Rob. 204.

FILING PROCEEDINGS.

See FIAT, FILING, &c.

FINES.

A single London Commissioner cannot fine for contempt. *Rez v. Faulkner*, 2 M. & A. 311.

FIXTURES.

A bankrupt being the owner, as well as occupier, of a freehold cotton mill, gave the petitioners an equitable mortgage on it, "together with the steam engines, and also all and singular other the moveable and fixed machinery and steam pipes then in, upon, about, and belonging to the said steam mill and premises, or occupied or used therewith;" and the bankrupt continued in possession of the mill and fixtures up to the period of his bankruptcy. Held, that all parts of the machinery and fixtures, which were so attached to the premises as to be legally affixed to the freehold, were not to be considered as goods and chattels within the 72d section of the Bankrupt Act, and that the assignees had no right to them, as against the equitable mortgagee. *Ex parte Wilson, re Butterworth*, 1835. 4 Dea. & Ch. 143 ; S. C. 2 M. & A. 61.

Where real property "with its appurtenances" (without other evidence of intention) was mortgaged by the owner of the fee, articles of furniture, as rolling maps, affixed before and after the mortgage to the freehold, although they might have been removable as between a landlord and

tenant, and although he continued in possession up to the time of his bankruptcy, passed by the mortgage and were taken out of the order and disposition of the bankrupt owner. Whatever is affixed to freehold by the owner of the inheritance is to be considered as a fixture till severed by him; and whether so affixed before or after a mortgage, passes absolutely to the mortgagee. *Ex parte Belcher*, 4 Dea. & Chit. 703; *S. C.* 2 M. & A. 160.

FOREIGN LAWS.

It was deposed, that two out of three provisional syndics may, by the law of France, sue to recover debts due to the bankrupt, and without the previous authority of the Juge Commissaire:—Held, that they may so sue in this country, unless the French law be shown to the contrary:—Held also, that the act of the two syndics sufficiently implied the absence or want of consent of the third, without showing his absence or want of consent. The declaration averred, that a party, a Frenchman, was a bankrupt. The evidence was, that he was only “en état de faillite” or insolvent:—Held no variance, as the English “bankrupt” does not appear identical with the French “banqueroute.” *Alison v. Furnival*, 4 Tyr. 751. *S. C.* 1 Crom. M. & R. 277.

FORM.

See AFFIDAVIT, FORM OF—PETITION,
FORM OF.

FOUR-DAY ORDER.

When all is regular, the four-day order to pay, &c., or stand committed, is of course at the office. *Ex parte and re Smith*, 2 M. & A. 213.

FRAUD.

Costs are always given against any party appearing on a petition, who endeavours to support a case of fraud, whether the costs are prayed or not. *Ex parte Taylor, re Percival*, 1834. 4 Dea. & Chit. 125; *S. C.* 2 M. & A. 36.

Proof cannot be made by the joint estate against the separate estate, except in the case of a fraudulent abstraction from joint funds by one of the partners; and not then, if there had been any waiver of the tortious act by the other partner, so as to reduce it to a matter of contract. *Ex parte Turner, re Mackenzie*, 1835. 4 Dea. & Chit. 169; *S. C.* 1 M. & A. 54.

Where the time for opening a fiat expires, and a second is then issued by another party, it is no ground for superseding the second, that it did not issue until after the first was actually opened, unless the party issuing the second knew that fact, or was guilty of some fraud. *Ex parte Westall, re Fletcher*, 1834. 4 Dea. & Chit. 350.

Where no fraud has been committed, the assignment by an insolvent debtor to his provisional assignee, under 7 Geo. 4. c. 57. passes only such property as the insolvent

has at the time of the assignment. *Sims v. Simpson*, 1 Bing. N. C. 306; *S. C.* 1 Scott, 177.

FRAUDULENT ASSIGNMENT AND CONVEYANCE.

A transfer made by a debtor under apprehension of arrest, is not fraudulent and void as *voluntary* under (the Insolvent Debtors' Act) 7 G. 4. c. 57. s. 32. *Corbould v. Broadhurst*, 1 Moody & Rob. 189.

Where a trader assigned by deed all his property in trust for the benefit of his creditors:—Held, that it was an act of bankruptcy under 6 Geo. 4. c. 16. s. 3., although in so doing he did not intend to defeat or delay his creditors, as, that being the necessary consequence of the assignment, he must in law be taken to have intended it. *Stewart v. Moody*, 1 Crom. M. & R. 777.

A., a soap and alkali manufacturer, being indebted to a banking company, assigned to them, to secure past and future advances, his leasehold property, with all the stock in trade, utensils, and effects thereon, and also a policy of insurance, as a security for monies advanced or to be advanced. The deed contained a power of sale, and a proviso, that the trader should remain in possession until default. The assignment did not include another part of *A.*'s property equal in amount to the debt covered by the security. In an action by *A.*'s assignees, to recover part of the property assigned, the jury

found that the deed was not executed in contemplation of bankruptcy:—Held, that it was a valid deed, and did not amount to an act of bankruptcy. *Carr v. Burdiss*, 1 Crom. Mee. & Roscoe, 443, 772.

FRAUDULENT PREFERENCE.

The Court will not interfere in making an order for the sale of mortgaged property, where the circumstances are suspicious, as to the mortgage being a fraudulent preference. *Ex parte Demdney, re Davy*, 1835. 4 Dea. & Chit. 181; *S. C.* 2 M. & A. 72.

Personal property may be transferred for a sufficient consideration, without writing, if the possession be also transferred; and a debtor may prefer one creditor to another, if the debtor be not a trader; but if he be a trader he cannot prefer one creditor to another, unless he be pressed. A fraudulent delivery of goods by a trader will be of itself an act of bankruptcy. A delivery of goods to one to whom no debt was due would be such a fraudulent delivery; and the delivery would likewise be fraudulent, though a debt was due, if the transfer of the goods was made voluntarily, and in contemplation of bankruptcy. *Scott v. Thomas*, 6 C. & P. 611.

A bill of exchange for a portion of his debt, given by a bankrupt, after commission and before certificate, to his assignee, who was also petitioning creditor, and had proved

for the residue of his debt:—Held, void in the hands of the assignee. *Rose v. Main*, 1 Bing. N. C. 357; S. C. 1 Scott, 127.

Defendants, B.'s bankers, had discounted for B. a bill payable Jan. 10th, drawn by B., and guaranteed by L. On the 3d of January, B., being in embarrassed circumstances, gave L. a cheque on defendants for the amount of the bill: the defendants on receiving the cheque handed the bill over to L.—B. became bankrupt January 9th:—Held, that his assignees could not sue defendants as having received the amount of the cheque by way of fraudulent preference. *Abbott v. Pomfret*, 1 Bing. N. C. 462; S. C. 1 Scott, 470.

FREEHOLDER.

A bankrupt being the owner as well as occupier of a freehold cotton mill, gave the petitioners an equitable mortgage on it, "together with the steam engines, and also all and singular other the moveable and fixed machinery and steam pipes then in, upon, about, and belonging to the said steam-mill and premises, or occupied or used therewith;" and the bankrupt continued in possession of the mill and fixtures up to the period of his bankruptcy:—Held, that all parts of the machinery and fixtures, which were so attached to the premises as to be legally affixed to the freehold, were not to be considered as goods and chattels within the 72nd section of the Bankrupt Act, and that

the assignees had no right to them as against the equitable mortgagee. *Ex parte Wilson, re Butterworth*, 1835. 4 Dea. & Chit. 143; S. C. 2 M. & A. 61; S. P. *Ex parte Belcher, re Maberly*, 4 Dea. & Ch. 703; S. C. 2 M. & A. 160.

FRENCH BANKRUPTCY.

It was deposed, that two out of three provisional syndics may, by the law of France, sue to recover debts due to the bankrupt, and without the previous authority of the Juge Commissaire:—Held, that they may so sue in this country, unless the French law be shown to the contrary:—Held also, that the act of the two syndics sufficiently implied the absence or want of consent of the third, without showing his absence or want of consent. The declaration averred, that a party, a Frenchman, was a bankrupt. The evidence was, that he was only "en etat de faillite" or insolvent:—Held, no variance, as the English "bankrupt" does not appear identical with the French "banqueroute." *Alison v. Furnival*, 4 Tyr. 751; S. C. 1 Crom. M. & R. 277.

FURTHER EVIDENCE.

The Court will in general rehear petitions and rescind former orders upon fresh evidence tendered, but not where such orders are made upon petitions to stay certificate or to supersede or annul fiat. *Ex parte and re Lavender*, 1835. 4 Dea. & Chit. 497.

FUTURE PROPERTY.

Where no fraud has been committed, the assignment by an insolvent debtor to his provisional assignee, under 7 *Geo.* 4. c. 57., passes only such property as the insolvent has at the time of the assignment. *Sims v. Simpson*, 1 Bing. N. C. 306; S. C. 1 Scott, 177.

GENERAL ORDER.

Legal mortgage of equitable estate is within Lord *Loughborough's* Order. *Ex parte Attwood, re Spooner*. 2 M. & A. 24.

GOODS AND CHATTELS.

A bankrupt being the owner, as well as occupier, of a freehold cotton mill, gave the petitioners an equitable mortgage on it, "together with the steam-engines, and also all and singular other the movable and fixed machinery, and steam-pipes then in, upon, about, and belonging to the said steam-mill and premises, or occupied or used therewith," and the bankrupt continued in possession of the mill and fixtures, up to the period of his bankruptcy:—Held, that all parts of the machinery and fixtures, which were so attached to the premises as to be legally affixed to the freehold, were not to be considered as goods and chattels within the 72nd section of the Bankrupt Act, and that the assignees had no right to them, as against the equitable mortgagees. *Ex parte Wilson, re*

Butterworth, 1835. 4 Dea. & Chit. 143; S. C. 3 M. & A. 61; S. P. *Ex parte Belcher*, 4 Dea. & Ch. 703; S. C. 2 M. & A. 160.

HABEAS CORPUS.

The Court has a general jurisdiction to entertain questions on the legality of commitment by Commissioners upon petition without habeas corpus, and without the warrant of commitment being before it; especially where the objections to the committal would not appear on the face of the warrant. *Dubit.* Sir J. Cross, as to the production of the warrant. *Quare*, whether this Court has any jurisdiction to issue the writ of habeas corpus? *Ex parte and re Jones*, 1834. 4 Dea. & Chit. 536.

HEARING.

Where, on petition to stay certificate, petitioner does not appear and petition is dismissed, certificate not ordered to go without the production of an affidavit that there is no collusion. *Ex parte Hetherington, re Glossop*, 1834. 4 Dea. & Chit. 224.

Where petitioner files no affidavits in support, but two days before hearing served notice to examine witnesses on respondent, 20 miles from London, Court refused application of respondent to postpone hearing so as to procure witnesses in answer till after petitioner's witnesses were examined. *Ex parte and re Lavender*, 1834. 4 Dea. & Chit. 485.

HUSBAND AND WIFE.

By the terms of a settlement made previous to the bankrupt's marriage, all the property of his intended wife was vested in trustees for her separate use, and she was to have all the rights and privileges of a *feme sole*. This property consisted of a hotel and furniture at Brighton, the business of which was conducted entirely by the wife, the bankrupt never living at the hotel, nor in any way interfering in the management of it:—Held, that this property was not in the reputed ownership of the bankrupt. *Ex parte Massey, re Massey*, 1835. 4 Dea. & Chit. 405; S. C. 2 M. & A. 173.

IMPOUNDING.

See FIAT, IMPOUNDING.

INFORMATION AND BELIEF.

The rule on petitions to stay certificate is, that the party objecting to the certificate, must himself make out a case to stay it; the bankrupt is not bound to answer mere allegations founded on information and belief. *Ex parte Green, re Armitstead*, 1834. 4 Dea. & Chit. 112; S. C. 2 M. & A. 31.

INJUNCTION.

An injunction will be granted to restrain assignees from proceeding in an action, where they have not an equitable, as well as legal, right. *Ex parte Booth, re Kew*, 1835. 4 Dea. & Ch. 211; S. C. 2 M. & A. 93.

After repeated acts of acquies-

cence of the bankrupt in the validity of a commission, and the dismissal of a former petition by him to the Lord Chancellor to supersede it, the Court will restrain him from bringing actions against his assignees. *Ex parte White, re Britten*, 1835. 4 Dea. & Ch. 279; S. C. 2 M. & A. 104.

Upon very slight circumstances of acquiescence, and where the bankrupt has lain by for 22 years without taking any active steps to upset the commission, this Court will, upon petition of assignees and a purchaser under the commission, grant an injunction to restrain actions commenced by the bankrupt against purchasers under the commission. *Ex parte Davy, re Chambers*, 1834. 4 Dea. & Ch. 322; S. C. 1 M. & A. 283.

INSOLVENCY.

See also ASSIGNMENT IN BANKRUPTCY, &c.—DISCHARGE FROM INSOLVENCY.

Specific performance of sale under Lord Loughborough's Order decreed by this Court, although the following objections were urged: viz. 1st. That particulars of sale did not state that sale took place under order of Court; it appearing that purchaser must have known the fact that it was so. 2d. That a third mortgagee of equity of redemption and an assignee on prior insolvency of bankrupt were not parties. 3d. Though the petitioning creditor's debt on which this fiat was founded was contained in the

schedule in prior insolvency; especially as the purchaser was presumed to have known of all the objections to the title, and was held to have waived them by granting a lease of the premises purchased by him before the title to him was completed. *Quære*, whether this Court has jurisdiction to direct specific performance of contract of purchase of bankrupt's property, where the purchaser did not know, and had no means of knowing, that the sale took place under order of this Court or of Commissioners? *Ex parte Sidebotham*, 4 Dea. & Ch. 693; S. C. 2 M. & A. 146.

A debt which has been included in the schedule on prior insolvency of debtor, may be a good petitioning creditor's debt. *Ex parte and re Barrington*, 2 M. & A. 255.

Semble. The discharge of an insolvent under 7 Geo. 4. c. 57., applies only to the debts named in the schedule, and not to all the debts due to the creditors named. *Bishop v. Polhill*, 1 Moody & Rob. 363.

Under the thirtieth section of the Insolvent Debtors' Act (7 G. 4. c. 57.) a debt due to the insolvent will pass to the provisional assignee, although it has been assigned to a third party before the insolvent's imprisonment, if notice of such assignment was not given to the debtor before such imprisonment. *Buck v. Lee*, 1 Ad. & El. 804.

A party outlawed on civil process, after judgment, and on his peti-

tion subsequently made to the Insolvent Debtors' Court, adjudged to be discharged, is not entitled to a reversal of the outlawry, though the debt on which the outlawry is founded be included in his schedule. *Dickson v. Baker*, 1 Ad. & El. 853.

Where no fraud has been committed, the assignment by an insolvent debtor to his provisional assignee, under 7 Geo. 4. c. 57., passes only such property as the insolvent has at the time of the assignment. *Sims v. Simpson*, 1 Bing. N. C. 306; S. C. 1 Scott, 177.

A transfer made by a debtor under apprehension of arrest, is not fraudulent and void as *voluntary* under (the Insolvent Debtors' Act) 7 Geo. 4. c. 57. s. 32. *Corbould v. Broadhurst*, 1 Moody & Rob. 189.

The copyhold property of an insolvent debtor vests in his assignee by virtue of the assignment under 7 Geo. 4. c. 57. s. 11., without entry on the court rolls. *Doc d. Smith v. Glenfield*, 1 Bing. N. C. 729.

INTEREST.

The 132nd section of 6 Geo. 4. c. 16., which directs the payments of interest to creditors in case of a surplus, has not a retrospective operation. *Ex parte Phillips, re Phillips*, 1834. 4 Dea. & Ch. 81; S. C. 1 M. & A. 674.

The interest made by the investment of unclaimed dividends, does not belong to the general estate, but is divisible among the creditors claim-

ing the hitherto unclaimed dividends. *Ex parte Renshaw, re Wild*, 1834. 4 Dea. & Ch. 483.

Assignees, on the representation of the solicitor to the commission that he is authorized to receive it as agent, pay over a dividend to such solicitor. It turns out he had no such authority. Upon petition of creditor for payment to him of the dividend, charging that no authority was given to that solicitor:—Held, that being solicitor to the commission he might be made respondent as well as the assignees, and that a joint order might be made against them all for its payment. On dividend being withheld, assignees ordered to pay it, with five per cent. interest, from time of application to them for payment. *Ex parte Story, re Johnson*, 1834. 4 Dea. & Ch. 504.

Trustee, under deed of trust, by a former petition, upholding the trust and praying to annul fiat, and failing, but consenting to have the account against him taken on that petition by reference, ordered to pay costs of that petition, and to pay balance in his hands, under trust-deed, to assignees, with interest at 4l. per cent. from date of order of reference, although there was no evidence of interest having been made. Costs of reference to be paid by estate. *Ex parte Harding*, 4 Dea. & Ch. 793.

Creditor who has a deposit of goods for his debt and interest, and who, at the request of the assignees, delays the sale for a better market

and afterwards sells, may apply the proceeds in reduction of the interest accrued due since the fiat. *Ex parte Kensington, re Lancaster*, 2 M. & A. 300.

The Master found, that two executors had, by signing joint cheques, enabled each other to receive sums belonging to the estate of their testatrix, when they were both largely indebted to that estate; and that the sums so received by them were debts proveable under their respective commissions, both executors having become bankrupt:—Held, that interest at 5 per cent., as the consequence of the *devastavit*, was to be added to the principal sums found to be proveable against the bankrupt estates of the executors. *Bick v. Motly*, 2 Mylne & Keen, 312.

INTERMEDIATE PROFITS.

Where there has been an order made for the sale of mortgaged property, and the sale is afterwards deferred, the mortgagee is entitled to apply the rents and profits in reduction of the interest accruing subsequent to the order of sale and up to the time of taking the account. *Ex parte Ramsbottom, re Penfold*, 1835. 4 Dea. & Ch. 198; S. C. 2 M. & A. 79.

In general an equitable mortgagee is not entitled to the rents, &c. prior to the date of the order for sale. But where, prior to the bankruptcy, the mortgagor absconds, and the equitable mortgagee of part of

the property takes possession of that part by an agent, and a fiat issues against the mortgagor, and then the solicitor to the commission on behalf of the creditors, and the equitable mortgagees, jointly, appoint the same agent to manage the whole property, which agent is subsequently adopted by the assignees:—Held, the mortgagee, though he was also petitioning creditor, was entitled to the rents, &c. from the time of his first taking possession. *Ex parte Bignold, re Postle*, 1834. 4 Dea. & Ch. 259; S. C. 2 M. & A. 16, 214.

Where, upon order of dividend, assignees forward to creditor a bill for the amount of his dividend, but creditor rejects it, because he claims more than is offered (namely, full payment, without allowing the assignees a set-off, which they claimed against him, and the amount of which, together with the sum tendered, made up the amount of dividend declared on creditor's proof,) and the proceeds of the bill are received by one assignee, and by him invested at interest:—The creditor was held, after twenty years and upwards, entitled to the fund, and all interest made by it. *Ex parte Holford*, 4 Dea. & Ch. 798; S. C. 2 M. & A. 289.

Creditor who has a deposit of goods for his debt and interest, and who at the request of the assignees delays the sale for a better market, and afterwards sells, may apply the proceeds in reduction of the interest accrued due since the fiat. *Ex parte*

Kensington, re Lancaster, 2 M. & A. 300.

If legal mortgage is ordered by the Commissioners to be sold, the assignees are entitled to the rents to the time of sale, unless the mortgagee makes an actual entry, or gives notice to the tenant to pay the rent to him. *Ex parte Living, re Tombs*, 2 M. & A. 223.

INVESTMENT.

Where, upon order of dividend, assignees forward to creditor a bill for the amount of his dividend, but creditor rejects it, because he claims more than is offered (namely, full payment, without allowing the assignees a set-off, which they claimed against him, and the amount of which, together with the sum tendered, made up the amount of dividend declared on creditor's proof,) and the proceeds of the bill are received by one assignee, and by him invested at interest:—The creditor was held, after twenty years and upwards, entitled to the fund, and all interest made by it. *Ex parte Holford*, 4 Dea. & Ch. 798; S. C. 2 M. & A. 289.

ISSUING FIAT.

See FIAT ISSUING.

JOINT CREDITORS.

A., B., & C., agree to dissolve their partnership, and that *A.* shall receive 550*l.* in discharge of his share in the concern, of which 50*l.* was agreed to be paid at the date of the

agreement, and the remaining 500*l.* by five several bills payable at future dates. Separate fiats are subsequently issued against *A., B., & C.*; and the stock and effects which originally belonged to the firm of the three are taken possession of and sold by the assignee, under the separate fiat against *B.* Held, that the agreement of the dissolution of the partnership was executed, and not executory; and that the joint creditors of *A., B., & C.*, had no lien on such stock and effects for the payment of the debts owing to them at the time of *A.*'s retiring from the partnership. *Ex parte Clarkson, re Fear*, 4 Dea. & Ch. 56; S. C. 2 M. & A. 4.

JOINT STOCK COMPANY.

By the rules of an Insurance Company, no person, except a director, was permitted to hold more than two shares in his own name; but no rule prevented a person from being beneficially entitled to more than two shares, by holding them in the name of another party. The petitioner, who was already the holder of two shares, having purchased two other shares, caused them to be entered in the name of the bankrupt in the Company's books, with the knowledge of one of the directors and the actuary. The bankrupt signed a declaration of trust, that he held the shares as trustee for the petitioner, but no notice of the trust was taken in the books of the Company;

and he continued to receive the dividends on the shares, accounting for them from time to time to the petitioner, up to the period of his bankruptcy, when the shares were still standing in his name. Held, that the shares did not pass to his assignees, as being in his order and disposition at the time of his bankruptcy. *Ex parte Watkins, re Kidder*, 1834. 4 Dea. & Ch. 87; S. C. 1 M. & A. 689.

By a clause in the deed of settlement of a banking company, it was stipulated that the company should have a lien on the share of such proprietors as were customers and indebted to the bank, and that no share should be transferred without the consent of the directors; and an abstract of these provisions was indorsed on the certificate of the share held by each proprietor. The bankrupt, at the time of his bankruptcy, was the owner of thirty of these shares, and had in his possession the certificates of ownership thus indorsed, being then largely indebted to the bank for advances:—Held, that these shares did not pass to his assignee under the clause of reputed ownership in the Bankrupt Act, so as to defeat the lien of the bank, which had been provided for in the deed. *Ex parte Plant, re Butterworth*, 1835. 4 Dea. & Ch. 160.

JOINT AND SEPARATE FIAT.

Under a joint and separate fiat, the amount of each bankrupt's allowance is to be estimated, not upon the

gross joint estate and his separate estate, but upon his share of the joint estate, together with his separate estate. *Ex parte* and *re Lomas*, 1834. 4 Dea. & Chit. 240; S. C. 1 M. & A. 525.

JURISDICTION.

The Court will not make any order, on the application of the assignees, as to the management for the sale of the bankrupt's property; they must act on their own responsibility. *Ex parte Belcher, re Maberly*, 1834. 4 Dea. & Chit. 1; S. C. 1 M. & A. 478.

A. deposits with *B.*, as a security for the repayment of a loan of money, the attested copy of the lease of a coal mine granted to *A.* and four other persons, as tenants in common. The mine was worked by them according to the stipulations of certain articles of partnership, which contained a proviso, that if any one partner wished to dispose of his share the others should have a right of pre-emption:—Held, (Sir *J. Cross, dissent.*.) that the usual order could not be made for the sale of *A.*'s share in this property, as in the ordinary case of an equitable mortgage, it being necessary that the partnership accounts should first be taken, for the purpose of ascertaining *A.*'s share in the property, which this Court had no jurisdiction to do, the other partners not being before the Court. *Ex parte Broadbent, re Borron*, 1834. 4 Dea. & Chit. 3; S. C. 1 M. & A. 635.

The mere circumstance of a creditor coming in under the commission to prove or claim a debt, only gives the Court jurisdiction as to the proof or claim, and not over any property in his possession, of which he claims the legal ownership. *Ex parte Dobson, re Thompson*, 1834. 4 Dea. & Chit. 69; S. C. 1 M. & A. 666.

Independently of the provisions in the acts of parliament, the Court of Review has a general jurisdiction to refer the bill of any solicitor of that Court for taxation. *Ex parte Copeland, re Burnard*, 1834. 4 Dea. & Chit. 86.

Where a party purchases of a creditor all his right to the dividends and interest on his proof, *semble*, that such party cannot proceed against the assignees by petition for an order to pay to him the dividends on the proof, but must be left to the ordinary means of enforcing the contract by action at law, or suit in equity. *Ex parte Richards, re Trevor*, 1835. 4 Dea. & Ch. 190.

An injunction will be granted to restrain assignees from proceeding in an action, where they have not an equitable, as well as legal, right. *Ex parte Booth, re Kew*, 1835. 4 Dea. & Chit. 211; S. C. 2 M. & A. 93.

An order made by the Court, sanctioning a pecuniary arrangement effected by the assignees. *Ex parte Prater, re Harley*, 1835. 4 Dea. & Chit. 214; S. C. 2 M. & A. 364.

An *ex parte* order was obtained

by the tenant of the assignees to refer it to the Commissioner to ascertain if a reduction of his rent would be beneficial to the bankrupt's estate. The Commissioner certified that it would, and that another person had tendered a higher rent than that to which he proposed to reduce the original rent. An application was made to confirm the certificate. A petition was presented by creditors, one of whom had offered the higher rent, to discharge the order of reference and the Commissioner's certificate. But the Court refused to interfere, leaving the petitioners to their remedy against the assignees, if they were aggrieved, as their rights were not bound by the proceeding, and as they were no parties to the order. *Sir J. Cross, dissent. Ex parte De Begnis, re Chambers*, 1834. 4 Dea. & Chit. 225; *S. C.* 1 M. & A. 277.

Reference to the Commissioner to allow, on the taxation of the petitioning creditor's bill of costs, certain expenses incurred before adjudication by parties appointed by the creditors to act for the benefit of the estate. *Ex parte Evans, re Bentley*, 1835. 4 Dea. & Chit. 392.

A creditor whose debt arises on a lost bill of exchange, issues a fiat, which he cannot support in consequence of his inability to prove the loss of the bill, so as to let in satisfactory evidence of its contents; upon which the assignees obtain an order, that a renewed fiat may issue on the debt of another:—Held, that the pe-

titioning creditor under the new fiat was not exonerated, under these circumstances, from making the payments of 10*l.* and 20*l.* to the Secretary of Bankrupts and the Accountant-General, under the provisions of the 45th & 46th sections of the Bankruptcy Court Act. *Ex parte Osborne, re Gunning*, 1835. 4 Dea. & Chit. 398; *S. C.* 2 M. & A. 140.

A reference ordered to the Commissioner to inquire whether an arrangement, in regard to a portion of the bankrupt's property, which was approved of at a meeting of the creditors, would be beneficial to the estate. *Ex parte Kirby, re Pottinger*, 1835. 4 Dea. & Chit. 400; *S. C.* 2 M. & A. 142.

The Court of Review has jurisdiction to enforce the specific performance of a contract of sale of the bankrupt's mortgaged property, which is sold under the usual order, against the purchaser of such property; and has also authority to decide, on evidence adduced before it, whether the purchaser has accepted the title. *Ex parte Sidebotham*, 3 Dea. & Chit. 818, confirmed on appeal. *Ex parte Barrington, re Barrington*, 1835. 4 Dea. & Chit. 461; *S. C.* 2 M. & A. 245.

Although, upon a fiat being superseded the Lord Chancellor has issued his confirmatory order, the Court of Review, upon a proper case on re-hearing, can in effect order a procedendo, by means of its intimation to the Lord Chancellor. *Ex*

parts and *re Lavender*, 1835. 4 Dea. & Chit. 496.

Though the assignees, with the concurrence of Commissioners, have ordered an allowance for maintenance, (under 6 Geo. 4. c. 16. s. 114,) till the bankrupt has passed his last examination, which order remains on the proceedings, yet if the assignees afterwards withhold the maintenance, on the ground of the final examination being adjourned *sine die*, the Court has no power to interfere, either as to the maintenance or the passing of the examination. *Ex parte* and *re Hall*, 1834. 4 Dea. & Chit. 580.

The Court has a general jurisdiction to entertain questions on the legality of commitment by Commissioners upon petition without habeas corpus, and without the warrant of commitment being before it; especially where the objections to the committal would not appear on the face of the warrant. *Dubit.* Sir J. Cross, as to the production of the warrant. *Quare*, whether this Court has any jurisdiction to issue the writ of habeas corpus? *Ex parte* and *re Jones*, 1834. 4 Dea. & Chit. 536.

Semble, this Court has no jurisdiction to order the Commissioner to certify the consent of creditors to a supersedeas, especially when he objects because fees payable under 1 & 2 Will. 4. c. 56. ss. 45, 46, are not paid. *Re Hawker*, 1834. 4 Dea. & Chit. 569.

Petition presented to the Lord

Chancellor before 1 & 2 Will. 4. c. 56., must be transferred by the Lord Chancellor to the Court of Review, before that Court can hear it. *Re Stokes*, 1835. 4 Dea. & Chit. 578.

The Lord Chancellor's jurisdiction to annul a fiat still subsists. *Re Chambers*, 1835. 4 Dea. & Chit. 578.

H. & P., drawers of a bill on and accepted by *P. & Co.*, for 2000*l.*, indorse it to *A.* for his accommodation. *W. & Co.* discount it for *A.* together with another bill drawn by *A.* for 2000*l.* upon and accepted by *S. & Co.* *A.*, and *H. & P.*, and *S. & Co.* severally become bankrupts. *W. & Co.* receive dividends from *S. & Co.*'s estate 666*l.* 13*s.* 4*d.* on *S. & Co.*'s acceptance; also 750*l.* from *H. & P.*'s estate on the bill drawn by them. They also prove against *A.*'s estate for 3535*l.* 6*s.* 8*d.*, as the amount of *H. & P.*'s bill, and balance of *A.*'s bill on *S. & Co.*, after deducting the 666*l.* 13*s.* 4*d.* received from *S. & Co.*, and receive 277*l.* 15*s.* 6½*d.* dividend thereon; 166*l.* 13*s.* 4*d.* being in respect of the proportion of proof on *H. & P.*'s bill. *P. & Co.* stopped payment, and under a composition deed *W. & Co.* receive 1000*l.* in respect of *H. & P.*'s bill of 1916*l.* 13*s.* 4*d.*; balance 88*l.* 6*s.* 8*d.* *Semble*, (*W. & Co.* claiming to have a right to retain *H. & P.*'s bill, in order to work out their remedies against *A.* in respect of *A.*'s bill,) that the assignees of *H. & P.*, although they tendered the balance 88*l.* 6*s.* 8*d.*, could not compel *W. & Co.* to deliver up *H. & P.*'s

bill. *Quære*, whether the Court has jurisdiction, on a subject of litigated title such as this. Held, that as *W. & Co.* were not bound to receive the 83l. 6s. 8d., the petition was premature at all events till the bill was fully paid off. *Ex parte Dickson, re Hutchinson*, 1835. 4 Dea. & Ch. 614.

The Court has no jurisdiction to control the discretion of a Commissioner as to what documentary evidence he shall require to be produced to prove an act of bankruptcy. But the Court intimated its opinion, that a letter written by the bankrupt's wife to a third party, in whose possession it remained, though it could not in any way afford direct evidence of the act of bankruptcy, (unless it was also proved that she was authorized by her husband to write it as his agent,) she not being examinable as a witness upon that point, yet might be ordered to be produced, to be used only as a clue to the procurement of other evidence as to the act of bankruptcy. *Ex parte Groom, re Chambers*, 1835. 4 Dea. & Chit. 640.

Specific performance of sale under Lord Loughborough's Order decreed by this Court, although the following objections were urged: viz. 1st. That particulars of sale did not state that sale took place under order of Court; it appearing that purchaser must have known the fact that it was so. 2d. That a third mortgagee of equity of redemption, and an assignee on prior insolvency of bankrupt, were not parties. 3d. Though the petitioning cre-

ditor's debt on which this fiat was founded was contained in the schedule in prior insolvency; especially as the purchaser was presumed to have known of all the objections to the title, and was held to have waived them by granting a lease of the premises purchased by him before the title to him was completed. *Quære*, whether this Court has jurisdiction to direct specific performance of contract of purchase of bankrupt's property, where the purchaser did not know, and had no means of knowing, that the sale took place under order of this Court or of Commissioners? *Ex parte Sidebotham*, 4 Dea. & Chit. 693; *S. C.* 2 M. & A. 146.

Quære, if the C. R. has jurisdiction to entertain a petition seeking delivery up of specific chattel. It has, if parties respondent consent to be bound. But respondent being trustee cannot consent. *Ex parte Ellison*, 4 Dea. & Chit. 725.

The Court will order a reference to inquire if it is proper to carry on the bankrupt's business, although some of the creditors dissent, but they will have liberty to prosecute the order. *Ex parte Mendel*, 4 Dea. & Chit. 725.

Reference to Registrar to see if arrangement out of Court by assignees was proper. *In re Hyslop*, 4 Dea. & Chit. 809; *S. C.* 2 M. & A. 289.

Court will only interfere to order sale of equitable mortgage when there is no dispute. *Ex parte Attwood, re Spooner*, 2 M. & A. 24.

A single London Commissioner cannot fine for contempt. *Re v. Faulkner*, 2 M. & A. 311.

There is jurisdiction to reach any part of the bankrupt's estate in the hands of the solicitor to the fiat. *Ex parte Benham, re Bramwell*, 2 M. & A. 280.

Commissioners cannot open audited accounts of assignees without permission from Court of Review. *Ex parte Benham, re Bramwell*, 2 M. & A. 272.

LACHES.

Where the time for opening a fiat expires, and a second is then issued by another party, it is no ground for superseding the second, that it did not issue until after the first was actually opened, unless the party issuing the second knew that fact, or was guilty of some fraud. *Ex parte Westall, re Fletcher*, 1834. 4 Dea. & Chit. 350.

Where time for opening town fiat is nearly run out; Court will not, at instance of petitioning creditor, supersede it, and issue a country fiat for alleged convenience of creditors. *Ex parte Bell, re Riley*, 1834. 4 Dea. & Chit. 481.

A. & B. partners, were solicitors to the commission. More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee till within six years. Beyond the six years *A.*

& *B.* (upon an agreement that *A.* should pay all the debts) dissolved partnership; and the assignee, with knowledge of this fact, continued to employ *A.* alone as the solicitor to the commission, and no attempt was made to charge *B.* with the monies received by *A. & B.* till very lately, viz. when an official assignee was appointed. Nor had *B.* ever acknowledged any liability to account:—Held, first, that as between *B.* and the creditors, neither the statute of limitations, nor laches, nor other conduct of the assignee, would operate as a bar, *A. & B.* being solicitors to the commission. But, secondly, that as the assignee was able to recoup the estate, he could not, under such circumstances of conduct on his part, call on *B.* to account. *A.* had become bankrupt; *semble*, nevertheless, that he or his assignees were necessary parties. *Ex parte Gould, re Robertson*, 1834. 4 Dea. & Chit. 547.

Solicitor to fiat must bear any expense which his neglect would cause the estate. *Ex parte Bennett, re Stephens*, 2 M. & A. 308.

Petition not to stand over to answer affidavits when there is laches. *Ex parte Sidebotham, re Barrington*, 2 M. & A. 79.

LANDLORD AND TENANT.

An ex parte order was obtained by the tenant of the assignees, to refer it to the Commissioners to ascertain if a reduction of his rent would be beneficial to the bankrupt's estate.

The Commissioner certified that it would, and that another person had tendered a higher rent than that to which he proposed to reduce the original rent. An application was made to confirm the certificate. A petition was presented by creditors, one of whom had offered the higher rent, to discharge the order of reference and the Commissioner's certificate. But the Court refused to interfere, leaving the petitioners to their remedy against the assignees, if they were aggrieved, as their rights were not bound by the proceeding, and as they were no parties to the order. *Sir J. Cross, dissent. Ex parte De Begnis, re Chambers, 1834. 4 Dea. & Chit. 225; S. C. 2 M. & A. 277.*

Lease for 21 years to *A. B.*, his executors, administrators and assigns. Proviso, that if *A. B.*, his executors, administrators or assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him &c., by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him, whereby any reasonable probability might arise of the estate being extended &c., the estate should determine and the lessor have power to re-enter. *A. B.* died during the term, and by his will devised the premises to his executors on certain trusts. The surviving executor having become bankrupt:—Held, that the lessor's right of re-entering thereupon accrued. *Doe dem. Bridgman v. David, 1 Crom. M. & R. 405; S. C. 5 Tyr. 125.*

A lease contained a proviso for re-entry, if the lessee, "his executors or administrators, or either of them," should become bankrupt. The executor of the lessee became bankrupt:—Held, that the landlord was entitled to recover in ejectment, although a term vested in a person as executor does not on his bankruptcy pass to the assignee. *Doe dem. Williams v. Davis, 6 C. & P. 614.*

LEASE.

Rejection of.

The Court allowed the assignees of a bankrupt to plead, in covenant on a lease, 1st, that the lessee's interest did not pass to them. 2dly, that they renounced the term in time to be discharged from the performance of covenants. *Thompson v. Bradbury, 1 Bing. N. C. 326; S. C. 1 Scott, 278.*

Determination of.

A lease contained a proviso for re-entry, if the lessee, his "executors or administrators, or either of them," should become bankrupt. The executor of the lessee became bankrupt:—Held, that the landlord was entitled to recover in ejectment, although a term vested in a person as executor does not on his bankruptcy pass to the assignee. *Doe dem. Williams v. Davies, 6 C. & P. 614.*

Premises were let for 21 years to *A.*, his executors, administrators, and assigns, with a proviso that if the lessee, his executors, administrators, or

assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him &c., by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him, whereby any reasonable probability might arise of the estate being extended &c., the estate should determine and the lessor have power to re-enter. Before the term ended, the lessee died, and by will bequeathed the premises held under this demise to his executors, on trust for his (testator's) widow. One executor died and the survivor became bankrupt:—Held, that the lessor had a right to re-enter, which he might enforce by ejectment. *Doe dem. Bridgman v. David*, 5 Tyr. 125; S. C. 1 Crom. M. & R. 405.

LEAVE TO BID.

On the sale of the bankrupt's mortgaged property, the Court, in the order for leave to bid, will not direct that the mortgagee shall not be required to make any deposit. *Ex parte Tatham, re Sheppard*, 1834. 4 Dea. & Ch. 360; S. C. 1 M. & A. 335.

Before an assignee applies for leave to bid at the sale of the bankrupt's property, he must call a meeting of the creditors, for the purpose of assenting to, or dissenting from, such proposed bidding. *Ex parte Molineux, re Blight*, 1835. 4 Dea. & Chit. 460; S. C. 2 M. & A. 245.

Court will not, except under very peculiar circumstances, give leave to solicitor to fiat to bid at

sale. *Ex parte Towne, re Brown*, 1834. 4 Dea. & Chit. 519.

Costs come out of estate where equitable mortgagee applies for leave to bid, and also for sale; *secus*, if merely for leave to bid. *Ex parte Berkeley, re Deacon*, 1834. 4 Dea. & Chit. 572.

LEAVE TO SURRENDER.

See BANKRUPT'S SURRENDER.

LENGTH OF TIME.

The Court will not vary the minutes of a former order, which has been pronounced more than three months, except on a petition for rehearing. *Ex parte Wilson, re Butterworth*, 1835. 4 Dea. & Chit. 156.

After there has been a change of assignees, and a long period of time has elapsed, the Court will not refer the accounts of the assignees for examination, for the purpose of charging the new assignees with the default of the former assignees. *Ex parte Richards, re Trevor*, 1835. 4 Dea. & Chit. 183; S. C. 2 M. & A. 75.

Where a commission issued in 1823, under which the bankrupt never obtained his certificate, and a fiat issued against him in 1832, the Court refused, under the circumstances, to supersede the fiat. *Ex parte Devas, re Kenton*, 1834. 4 Dea. & Chit. 366; S. C. 1 M. & A. 420.

Where the petitioning creditor's bill, after being taxed by the Commissioners, had been paid, and

the assignees accounts had been audited, for the space of six years, the Court refused to order a re-taxation of it by the Registrar. *Ex parte Christy, re Barrow*, 1835. 4 Dea. & Chit. 414.

It is a matter of course for any creditor who has proved to the amount of 20*l.* to apply within a reasonable time, under the 14th section of 6 *Geo.* 4. c. 16., for a re-taxation of any bill of the solicitor to the commission; but not where a period of three years has been suffered to elapse after payment of such bill. But where the creditor applies to the general jurisdiction of the Court, and points out objectionable items, the Court will then refer the bill to its proper officer, to review the former taxation. Where, however, a bill has been already taxed by the proper officer of the Court in which the business has been done, the Court of Review will not in such case disturb the taxation. What are objectionable items in the solicitor's bill for business connected with the meetings of the Commissioners? *Ex parte Christy, re Barrow*, 1835. 4 Dea. & Chit. 414.

Solicitor's bill taxed, and paid six years back, will not be ordered to be retaxed, without special reasons. *Ex parte Hutchinson, re Freeman*, 1834. 4 Dea. & Chit. 530.

One of a double proof made more than six years back, ordered to be expunged, according to *Ex parte Moul.* But dividends received on

the expunged proof more than six years back, cannot be refunded, even though there was no chance of recouping the injured estate out of future dividends from the remaining proof. *Ex parte Soper, re Salter*, 1835. 4 Dea. & Chit. 569.

Where, upon order of dividend, assignees forward to creditor a bill for the amount of his dividend, but creditor rejects it, because he claims more than is offered (namely, full payment, without allowing the assignees a set-off, which they claimed against him, and the amount of which, together with the sum tendered, made up the amount of dividend declared on creditor's proof,) and the proceeds of the bill are received by one assignee, and by him invested at interest:—The creditor was held, after twenty years and upwards, entitled to the fund, and all interest made by it. *Ex parte Holford*, 4 Dea. & Chit. 798; 3 *C.* 2 *M.* & *A.* 289.

In 1825 an assignment from provisional assignee to assignees, was prepared, but through neglect of solicitor never executed. The provisional assignment ordered to be vacated, and a new assignment executed by the Commissioners. It seems the 1 & 2 *Will.* 4. c. 56. s. 25. do not apply in such a case. The solicitor having been paid for the assignment, ordered to refund. *Ex parte Bennett, re Stephens*, 2 *M.* & *A.* 306.

LETTERS.

A trader, in embarrassed cir-

cumstances, absented himself from his house from the 16th of February till the 9th of March. Upon an issue, whether he had committed an act of bankruptcy on or before the 5th of March, two letters written by him on the 16th January preceding, asking for time on two bills of exchange payable by him in February, were received in evidence to show the motive of his absence. *Smith v. Cramer*, 1 Scott, 541; S. C. 1 Bing. N. C. 585.

LIEN.

A. and *B.* have separate banking establishments in Scotland, where it is the custom of the different bankers to exchange the notes they hold of each other at stated periods, *A.* and *B.* were accustomed to make such mutual exchanges accordingly. *B.* becomes bankrupt, when his agent, who conducted the business in Scotland, had in his possession notes of *A.*'s bank to the amount of 230*l.*, while *A.* had notes of *B.* to the amount of 764*l.* *B.*'s agent refuses to exchange the notes for 230*l.*, claiming himself a lien on them; and *B.*'s assignees allow them to retain these notes in satisfaction of such lien. Held, that *A.* was entitled to recover the value of the notes from the assignees of *B.* *Ex parte National Bank of Scotland, re Maberly*, 1834. 4 Dea. & Ch. 32; S. C. 1 M. & A. 644.

A., *B.*, and *C.*, agree to dissolve their partnership, and that *A.* shall

receive 550*l.* in discharge of his share in the concern, of which 50*l.* was agreed to be paid at the date of the agreement, and the remaining 500*l.* by five several bills payable at future dates. Separate fiats are subsequently issued against *A.*, *B.*, and *C.*; and the stock and effects which originally belonged to the firm of the three, are taken possession of and sold by the assignee under the separate fiat against *B.* Held, that the agreement of the dissolution of the partnership was executed, and not executory; and that the joint creditors of *A.*, *B.*, and *C.*, had no lien on such stock and effects for the payment of the debts owing to them at the time of *A.*'s retiring from the partnership. *Ex parte Clarkson, re Fear*, 1834. 4 Dea. & Ch. 56; S. C. 2 M. & A. 4.

Where a creditor applies to prove a debt, and claims a right to property in his possession, to which the Commissioners think he has no lien, the Commissioners should admit the proof, and leave the question of lien to be controlled merely by retention of the dividend. *Ex parte Dobson, re Thompson*, 1834. 4 Dea. & Chit. 69; S. C. 1 M. & A. 666.

A bankrupt conveys his real estate to two trustees upon certain trusts for the payment of his debts, and subsequently enters into an agreement with them as to the sale of the property; after which he takes forcible possession of part of it, and the trustees bring an action of ejectment against him, which, with ano-

ther action, is referred to the decision of an arbitrator. The award finds, that the creditors were entitled to recover in the action of ejectment, and directs that a sum of money which was due to the trustees for expenses incurred by them in the execution of the trusts shall be paid by instalments, and in default of payment, that the property shall be sold, and the proceeds applied in discharge of the debt due to the trustees:—Held, that the award was no charge upon the land; but that it did not destroy the lien thereon, which the deed had expressly given to the trustees for the expenses incurred by them in the execution of the trusts. *Ex parte Coppard, re Thornton*, 1833. 4 Dea. & Chit. 102.

By a clause in the deed of settlement of a banking company, it was stipulated that the company should have a lien on the share of such proprietors as were customers and indebted to the bank, and that no share should be transferred without the consent of the directors; and an abstract of these provisions was indorsed on the certificate of the share held by each proprietor. The bankrupt, at the time of his bankruptcy, was the owner of thirty of these shares, and had in his possession the certificates of ownership thus indorsed, being then largely indebted to the bank for advances:—Held, that these shares did not pass to his assignee under the clause of reputed ownership in the Bankrupt Act, so as

to defeat the lien of the bank, which had been provided for in the deed. *Ex parte Plant, re Butterworth*, 1835. 4 Dea. & Ch. 160.

G. & Co., to secure a permanent loan from their bankers, *V. & Co.*, to the amount of 20,000*l.*, agree to deposit with them their joint note for that amount; and, as collateral security, 10,000*l.* in bills not to be moved, and 10,000*l.* in bills to be with *G. & Co.* during the day, and also to leave a standing balance on the account every night of 4000*l.* In pursuance of this agreement, *G. & Co.* every evening delivered to *V. & Co.* bills of various amounts, but not less than 10,000*l.* on any occasion, unless their cash balance exceeded 4000*l.*; and every morning they received these bills back again from *V. & Co.*, which were either returned, or others of equal amount substituted, every evening. On the last day of dealing between the parties, *G. & Co.* informed *V. & Co.* that as they had drawn out the cash balance which they ought to have left in their hands, they had given additional security to *V. & Co.* by lodging bills with them to a larger amount. The amount of the sum so overdrawn was, in fact, 3000*l.*, and the amount of the bills then deposited was 22,666*l.*, including a note of hand of *B. & Co.* for 10,000*l.*, for which *B. & Co.* had only received a partial consideration from *G. & Co.*; but *V. & Co.* had no notice of such want of consideration attaching to

this note. At the closing of the business between *G. & Co.* and *V. & Co.*, a balance was due to *V. & Co.* of 35,386*l.*, for which they held the deposit of the bills and note to the amount of 22,666*l.*, besides the note of *G. & Co.* for 20,000*l.* *G. & Co.* afterwards stopped payment, when *V. & Co.* gave them a letter of licence, which was however subsequently recalled. *B. & Co.* became bankrupt:—Held, that *V. & Co.* were entitled to prove the full amount of the note for 10,000*l.* against *B. & Co.*'s estate; but that as the specified purpose of the deposit of the bills by *G. & Co.* with *V. & Co.* was not to secure any general balance, but merely the two loans of 20,000*l.* and 3000*l.*; the bills deposited were to be considered only as collateral security for those two sums, and not for the amount of the whole debt due to *V. & Co.*; that the proceeds of the other bills and of *G. & Co.*'s joint note must therefore be deducted from the 23,000*l.*; and that *V. & Co.* were entitled to receive dividends on their proof against *B. & Co.*'s estate, until they should have received full payment of the unsatisfied balance of this latter sum. *Ex parte Vere, re Bentley*, 1835. 4 Dea. & Chit. 295; *S. C.* 2 M. & A. 123.

The bankrupt kept an account with *A., B.,* and *C.*, as bankers, who afterwards took into partnership the son of *C.*; after which, the bankrupt executed a legal mortgage to *A., B.,*

and *C.*, for securing the repayment of the loan of 6000*l.* Subsequently to this, the bankrupt addressed a letter to Messrs. *A., B.,* and *C.*, authorizing them to consider all the securities they then held as responsible for any advances made, or to be made by them to the bankrupt. Held, that this letter must be taken to have been addressed by the bankrupt to the four partners, and amounted to an equitable mortgage to the four, of the previous legal mortgage to the three, operating as a security for all the advances made either by the three or the four partners. *Ex parte Parr, re Borron*, 1835. 4 Dea. & Ch. 426.

The bankrupt shipped goods to *M.* and *F.* at New South Wales, and the petitioner accepted bills drawn by the bankrupt for the invoice price, upon the express agreement that the proceeds of the several consignments should be received by the petitioner, and be appropriated by him in discharge of such acceptances; and notice of this agreement was given to *M.* and *F.* Two bills which were remitted to England by *M.* and *F.* on account of the proceeds of some of the shipments made by the bankrupt, came to the hands of the assignees:—Held, that the petitioner was entitled to the proceeds of these bills, as well as all the future proceeds that might come to the hands of the assignees, in respect of the shipments made by the bankrupt to *M.* and *F.* to be applied in discharge of the petitioner's acceptances. *Ex parte*

Flower, re Cormic, 1835. 4 Dea. & Ch. 449; S. C. 2 M. & A. 224.

In a case of doubt, and where there is no memorandum in writing accompanying the deposit of deeds, the Court leans against the deposit as a security for an antecedent debt, though it favours it in regard to subsequent advances. *Ex parte Martin, re Cowderoy*, 1835. 4 Dea. & Ch. 457; S. C. 2 M. & A. 243.

Plaintiff sold to *J.* trees lying on land occupied by *B.*, and *J.* was to have power of removing them when he pleased. The trees having been marked by the purchaser, the cubical contents of each ascertained, and some of them having been taken away:—Held, that the transfer of the whole was complete, and that upon *J.*'s bankruptcy the plaintiff could not enforce any lien on the trees, notwithstanding they remained on the land of *B.*, and the sum total of the cubical contents had not been ascertained. *Tansley v. Turner*, 2 Bing. N. C. 151.

Goods were sold under an invoice which expressed that they remained at rent. The vendee consequently accepted a bill drawn by the vendor for the price, which was negotiated by the vendor. Whilst the bill was running, the vendee sold a part; which, by his direction, was delivered by the vendor to the sub-vendee, whom the vendor charged with warehouse rent for the past, which he paid. Subsequently the

vendee became bankrupt, and the bill was dishonored:—Held, that the assignee of the bankrupt vendee could not, without paying the price, maintain trover against the vendor for the residue of the goods which had remained in his hands. *Miles v. Gordon*, 2 Crom. & M. 504.

S. contracted with the defendants to execute an extensive building operation for them, in consideration of a certain sum, and of being allowed to use certain materials. The defendants' engineer was empowered to reject any materials or work not in his opinion conformable to the plans and specifications, and to provide other materials, and employ competent persons to perform the work, if *S.* failed to do so, as well as to deduct the amount from the sum payable to him under the contract. The defendants were at liberty to diminish or add to the works, paying *S.* at the contract prices accordingly, or deducting from them, if necessary. *S.* placed on the defendants' premises steam-engines, rail-roads, materials, implements, and other articles of various kinds, necessary to carry on the works. The defendants' engineer visited the premises daily and rejected such of the materials brought thither by *S.* as he thought unfit for use. During the progress of the works advances were made by the defendants to *S.* on his application; he agreeing that all the engines, materials, &c., brought or to be brought

on the defendants' premises for use in constructing the works, should be a security for such advances. Those advances always exceeded the value of the property so on the premises. *S.* became bankrupt before the works were completed, upon which the defendants erased his marks on the engines, materials, implements, &c. then on their premises. In trover, brought by the assignees of *S.* against the defendants, to recover such engines, materials &c.:—Held, first, that the arbitrator had no power to award that the defendants were entitled to prove against the estate of *S.* for the sum advanced to him by them beyond the value of the work done and materials furnished by him, and of the engines, &c. agreed to stand as security. Secondly, That the plaintiffs were not entitled to recover for extra work done by the bankrupt. Thirdly, That as there had been such a possession of the engines, materials, &c. by the defendants as would support the lien, which it was the effect of the bankrupt's agreement to confer on them, the plaintiffs were only entitled to recover for such materials, &c. as were brought on the defendants' premises after the act of bankruptcy. Fourthly, That payments to the bankrupt by the defendants, after the latter portions of materials were brought on the premises, could not be considered as payments for those particular goods in the course of business, but as general advances only, so that they could not be retained by

the defendants under 6 G. 4. c. 16. s. 82. *Crowfoot v. London Dock Company*, 4 Tyr. 967.

W. shipped at Leghorn twenty-three casks of oil, on account and by the order of *L.* at Liverpool, and transmitted to him a bill of lading. Before the arrival of the oil, *L.* indorsed the bill of lading, and deposited it with *H.*, who advanced money on it, having previously advanced money on other goods (the property of *L.*) deposited with him. On the arrival of the oil, *L.* having previously become bankrupt, and *W.* not having been paid for it, *W.*'s agents claimed it of the master of the ship; but the latter delivered it to *H.*, who afterwards sold the goods of *L.* as well as the oil of *W.* The net proceeds of the goods belonging to *L.* were sufficient to satisfy the debt due from *L.* to *H.* *H.* paid himself his debt, and deposited the net proceeds of *W.*'s oil with a third person, to abide the event of the award of an arbitrator, to whom all disputes between *W.* and the assignees of *L.* were referred. The arbitrator having stated the above facts on his award for the opinion of this Court:—Held, that *W.*, the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of *L.*, because the property in and the right to the possession was then vested in *H.*, the indorsee of the bill of lading, for value; and further, that *W.* had not, by reason of such claim, any legal

right to the possession of the goods after *H.*'s lien was satisfied: but that in a Court of Equity such transfer to *H.* would be treated as a pledge or mortgage only, and therefore *W.*, by his attempted stoppage in transitu, acquired a right to the goods in equity, subject to *H.*'s lien against the assignees of *L.*:—Held, secondly, that *W.*, by means of his goods, had become surety to *H.* for *L.*'s debt, and had a clear equity to oblige *H.* to pay his debt out of *L.*'s own goods deposited with him in ease of such surety; and all the goods both of *W.* and *L.* having been sold, *W.* might insist on the proceeds of *L.*'s goods being appropriated to payment of the debt: and, therefore, that *W.* was entitled to have all the proceeds of the oil paid over to him. *Re the Arbitration between Westzinthus and Assignees of Lapage and Co.: and between Rogers and Co. and the same Assignees*, 5 Barn. & Adol. 817.

LIMITATIONS, STATUTE OF.

See STATUTE OF LIMITATIONS.

LORD CHANCELLOR.

See also ORDER OF LORD CHANCELLOR.

The Lord Chancellor's jurisdiction to annul a fiat still subsists. *Re Chambers*, 1835. 4 Dea. & Chit. 578.

The Lord Chancellor is not liable to an action in respect of an order of commitment made by him in bankruptcy, even admitting such order to

have been irregular. *Dicas v. Lord Brougham and Vaux*, 1 Moody & Rob. 309.

LOCUS STANDI.

An uncertificated bankrupt cannot petition that his assignees may be ordered to account, without alleging that his estate will produce a surplus, after paying 20s. in the pound. *Ex parte and re Ryley*, 1834. 4 Dea. & Chit. 50.

On a petition to stay the certificate by a creditor, at whose suit the bankrupt is in custody, the bankrupt must be discharged before the petition can be heard. *Ex parte Green, re Armitstead*, 1834. 4 Dea. & Chit. 112; S. C. 2 M. & A. 31.

A creditor, who becomes bankrupt after proving his debt, may nevertheless petition to stay the first bankrupt's certificate, if the assignees of the creditor do not interfere. *Ex parte Taylor, re Percival*, 1834. 4 Dea. & Ch. 125; S. C. 2 M. & A. 36.

Although a fiat is fraudulently sued out, yet a creditor, whose debt is impeachable on the ground of usury, cannot petition to supersede it. *Ex parte Jarman, re Theed*, 1835. 4 Dea. & Chit. 393; S. C. 2 M. & A. 119.

On petition to stay certificate, it must appear from the petition itself that the party applying is a creditor; if it appear merely inferentially, that is sufficient: if it merely so appear from the affidavits in support, that is insufficient; and no amendment of peti-

tion to stay certificate allowed. *Ex parte Robinson, re Case*, 1884. 4 Dea. & Chit. 499.

A country fiat having been directed to three barristers, under the 1 & 2 Will. 4. c. 56., the solicitor neglected (on account of the expense) to summon one of them, the petitioner, who throughout evinced his willingness and claimed the right to attend. Held, that the Court had jurisdiction, at the instance of the barrister, to interfere: and ordered that the solicitor should summon such barrister in future, and recompence him for all fees which he would otherwise have received. *Ex parte Douglass*, 4 Dea. & Chit. 768; S. C. 2 M. & A. 218. This is followed in *Ex parte Williams*, 2 M. & A. 616.

Barrister cannot petition to have his name inserted in the commission. *Ex parte Ward*, 2 M. & A. 219, n.; but see *Ex parte Douglass*, 4 D. & C. 768; 2 M. & A. 218.

MAINTENANCE.

See *BANKRUPT'S ALLOWANCE FOR*.

MASTER AND SERVANT.

A commission of bankrupt does not operate as a dissolution of the contract of hiring between the bankrupt and his clerk. If the clerk, being hired for a year, continue in the bankrupt's office after the bankruptcy, and then in the middle of the year, by mutual consent, the contract be rescinded, on the understanding that the clerk is to be paid rateably

for his services during the current year, the clerk is not barred by the certificate from recovering all the wages due from the expiration of the year last before the commission up to the time of rescinding, no part of such wages being provable under the commission. The provision in 6 G. 4. c. 16. s. 48., for payment of debts and servants, makes no difference in this respect. A jury may infer such an understanding from the clerk having continued after the bankruptcy in the bankrupt's office as long as the bankrupt's brother remained there managing the business (as he had also done for a month before the bankruptcy), although, in fact, there was nothing for the clerk to do after the bankruptcy. *Thomas v. Williams*, 1 Ad. & El. 685.

MESNE PROFITS.

See *INTERMEDIATE PROFITS*.

MEETING OF CREDITORS.

Before an assignee applies for leave to bid at the sale of the bankrupt's property, he must call a meeting of the creditors, for the purpose of assenting to, or dissenting from, such proposed bidding. *Ex parte Molineux, re Blight*, 1835. 4 Dea. & Ch. 460; S. C. 2 M. & A. 245.

MEMORANDUM OF DEPOSIT.

A letter written some months after the deposit of deeds, acknowledging the purpose for which they

were deposited, is a sufficient memorandum in writing to entitle an equitable mortgagee to his costs out of the produce of the sale. *Ex parte Reynolds, re Moore*, 1835. 4 Dea. & Chit. 278; S. C. 2 M. & A. 104.

In a case of doubt, and where there is no memorandum in writing accompanying the deposit of deeds, the Court leans against the deposit as a security for an antecedent debt, though it favours it in regard to subsequent advances. *Ex parte Martin, re Cowderoy*, 1835. 4 Dea. & Chit. 457; S. C. 2 M. & A. 243.

MINUTES.

See VARYING MINUTE.

MORTGAGE & MORTGAGEE.

See also EQUITABLE MORTGAGE—

EQUITY OF REDEMPTION.

On the sale of the bankrupt's mortgaged property, the Court, in the order for leave to bid, will not direct that the mortgagee shall not be required to make any deposit. *Ex parte Tatham, re Sheppard*, 1834. 4 Dea. & Chit. 360; S. C. 1 M. & A. 335.

The bankrupt kept an account with A., B., & C., as bankers, who took into partnership the son of C.; after which the bankrupt executed a legal mortgage to A., B., & C., for securing the repayment of the loan of 6000*l*. Subsequently to this, the bankrupt addressed a letter to Messrs. A., B., & C., authorizing them to

consider all the securities they then held as responsible for any advances made, or to be made by them to the bankrupt:—Held, that this letter must be taken to have been addressed by the bankrupt to the four partners, and amounted to an equitable mortgage to the four of the previous legal mortgage to the three, operating as a security for all the advances made either by the three or the four partners. *Ex parte Parr, re Borron*, 1835. 4 Dea. & Chit. 426.

In a case of doubt, and where there is no memorandum in writing accompanying the deposit of deeds, the Court leans against the deposit as a security for an antecedent debt, though it favours it in regard to subsequent advances. *Ex parte Martin, re Cowderoy*, 1835. 4 Dea. & Chit. 457; S. C. 2 M. & A. 243.

Where real property “with its appurtenances” (without other evidence of intention) was mortgaged by the owner of the fee, articles of furniture, as rolling maps, affixed before and after the mortgage to the freehold, although they might have been removable as between a landlord and tenant, and although he continued in possession up to the time of his bankruptcy, passed by the mortgage, and were taken out of the order and disposition of the bankrupt owner. Whatever is affixed to freehold by the owner of the inheritance is to be considered as a fixture till severed by him; and whether so affixed before or after a mortgage,

passes absolutely to the mortgagee. *Ex parte Belcher*, 4 Dea. & Chit. 703; S. C. 2 M. & A. 160.

If legal mortgage is ordered by the Commissioners to be sold, the assignees are entitled to the rents to the time of sale, unless the mortgagee makes an actual entry, or gives notice to the tenant to pay the rent to him. *Ex parte Living, re Tombs*, 2 M. & A. 223.

MOTION GENERALLY.

See EX PARTE MOTION.

Where a party wishes an essential alteration to be made in the judgment of the Court, as pronounced on a former hearing, he must not apply to amend the minutes of the order, but must petition for a rehearing. *Ex parte Soper, re Salter*, 1835. 4 Dea. & Chit. 275; S. C. 2 M. & A. 58.

Petition in paper of day; motion made, on notice, that it might stand over to amend, by adding a party respondent. Party moving must pay costs of all parties served with notice; but petition not being called on, without costs of the day. *Ex parte Story, re Johnson*, 1834. 4 Dea. & Chit. 504.

What done by.

Substantial variations in order cannot be effected by motion, but only on petition to re-hear. *Ex parte Soper, re Salter*, 1835. 4 Dea. & Chit. 569.

Order for four-day order, to-

wards commitment, must be prayed by petition, not motion, and certificate of Registrar of non-conformity should be dated the very day of the application for the short order. *Ex parte Myers, re Sudell*, 1835. 4 Dea. & Chit. 579.

Order cannot be rescinded on motion. *Re Walker*, 2 M. & A. 267.

MOTION OF COURSE.

See also EX PARTE MOTION.

Affidavits referred for scandal on motion of course. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Chit. 217.

Motion to confirm report as to scandal in affidavits is a motion of course. *Ex parte Hetherington, re Glossop*, 1834. 4 Dea. & Chit. 223.

MULTIFARIOUSNESS.

Multifariousness is not sufficient cause for the absolute dismissal of a petition; *aliter*, where the defect is want of proper parties. *Ex parte Devas, re Kenton*, 1834. 4 Dea. & Chit. 366; S. C. 1 M. & A. 420.

NEGLECT.

See LACHES.

NOTICE.

On a deposit of a policy of assurance by way of equitable mortgage, the onus does not lie on the mortgagee, to show that notice of the deposit was given to the office

before the act of bankruptcy,—but with the assignees, to show that it was not. *Ex parte* and *re Stevens*, 1834. 4 Dea. & Chit. 117.

A bankrupt deposits with the petitioner, by way of equitable mortgage, an assignment, which had been made to the bankrupt, of a reversionary interest under a will; no notice of the assignment having been given to the executors either by the bankrupt or by the petitioner:—Held, that the property was not within the order and disposition of the bankrupt as reputed owner. *Ex parte Newton, re Goren*, 1834. 4 Dea. & Chit. 138; *S. C.* 2 M. & A. 51.

A party, to whom the bankrupt had assigned a policy of assurance, sends an agent to the office for the purpose of paying the annual premium, who, in course of conversation with one of the clerks in the office, tells him of the policy having been so assigned:—Held, that this was not sufficient notice to the insurance office. *Ex parte Carbis, re Croggon*, 1834. 4 Dea. & Chit. 354; *S. C.* 1 M. & A. 693, n.

A notice to produce the proceedings must be served on the assignees, not on the bankrupt. *Ex parte* and *re Daly*, 1834. 4 Dea. & Chit. 364.

The bankrupt being one of the directors of a life assurance office, deposits a policy of that office with his bankers, as a collateral security for advances, one of the bankers

being also one of the auditors of the assurance office:—Held, that this was sufficient notice to the office of the transfer of the bankrupt's interest in the policy, to prevent the claim of reputed ownership. *Ex parte Waithman, re Raikes*, 1835. 4 Dea. & Chit. 412; *S. C.* 2 M. & A. 364.

Where the owner of shares in an insurance company transfers them by way of equitable mortgage, though he does not observe the rules of the company in regard to the mode of transfer, and though he continues to act as director without having any other shares than those assigned (the being a shareholder to a certain extent alone entitling him so to act); yet if the transferee gives notice to the company of his mortgage, and the owner becomes bankrupt, they are taken out of his order and disposition; especially where the company make entry of the notice in their books in such a manner as to evince their knowledge that such owner could not further dispose of the shares. Bare notice in such cases seems sufficient. *Ex parte Masterman*, 4 Dea. & Ch. 751; *S. C.* 2 M. & A. 209.

If mortgagee be himself the trustee to whom notice was requisite, the transaction itself is notice enough to prevent reputed ownership. *Ex parte Smart, re Holt*, 2 M. & A. 60.

If legal mortgage is ordered by Commissioners to be sold, the assignees are entitled to the rents to the time of the sale, unless the mort-

gagge makes an actual entry, or gives notice to tenant to pay rent to him. *Ex parte Living, re Tombs*, 2 M. & A. 223.

To assumpsit, by two plaintiffs, for goods sold, &c., defendant pleaded the bankruptcy of one. Replication, that, before the bankruptcy, the bankrupt plaintiff assigned to the other all his interest in the debt, and that the bankrupt now sued only as trustee for his co-plaintiff. The Court was of opinion that the replication was bad, for not stating that the debtor had had notice of the supposed assignment, although the defendant had pleaded over without alleging the want of notice. But the plaintiff had leave to amend. *Dean v. James*, 1 Ad. & El. 809.

Under the thirtieth section of the Insolvent Debtors' Act (7 G. 4. c. 57.) a debt due to the insolvent will pass to the provisional assignee, although it has been assigned to a third party before the insolvent's imprisonment, if notice of such assignment was not given to the debtor before such imprisonment. *Buck v. Lee*, 1 Ad. & El. 804.

To an action by the assignees of a bankrupt ship-owner for the freight of a voyage to India, accruing to him before his bankruptcy, the defendant pleaded that the ship-owner, before his bankruptcy, assigned by deed the freight in question to I., in trust to discharge a debt due from the ship-owner to I., and to pay the surplus, if any, to the ship-owner;

that the defendant had notice of such assignment, and that the freight, which was not sufficient to discharge the debt, had been demanded of him by I.:—Held, a good bar to the action. *Leslie v. Guthrie*, 1 Bing. N. C. 697.

OFFICER OF COURT.

Independently of the provisions in the acts of parliament, the Court of Review has a general jurisdiction to refer the bill of any solicitor of that Court for taxation. *Ex parte Copeland, re Burnard*, 1834. 4 Dea. & Chit. 86.

A creditor whose debt arises on a lost bill of exchange, issues a fiat, which he cannot support, in consequence of his inability to prove the loss of the bill, so as to let in satisfactory evidence of its contents; upon which the assignees obtain an order, that a renewed fiat may issue on the debt of another creditor:—Held, that the petitioning creditor under the new fiat was not exonerated, under these circumstances, from making the payments of 10*l.* and 20*l.* to the Secretary of Bankrupts and the Accountant General, under the provisions of the 45th and 46th sections of Bankruptcy Court Act. *Ex parte Osborne, re Gunning*, 1835. 4 Dea. & Chit. 398; S. C. 2 M. & A. 140.

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PARTICULARS OF SALE.

Specific performance of sale under Lord *Loughborough's* Order decreed by this Court, although the following objections were urged: viz. 1st. That particulars of sale did not state that sale took place under order of Court; it appearing that purchaser must have known the fact that it was so. 2d. That a third mortgagee of equity of redemption and an assignee on prior insolvency of bankrupt were not parties. 3d. Though the petitioning creditor's debt on which this fiat was founded was contained in the schedule in prior insolvency; especially as the purchaser was presumed to have known of all the objections to the title, and was held to have waived them by granting a lease of the premises purchased by him before the title to him was completed. *Quære*, whether this Court has jurisdiction to direct specific performance of contract for purchase of bankrupt's property, where the purchaser did

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Multifariousness is not sufficient cause for the absolute dismissal of a petition; *aliter*, where the defect is want of proper parties. *Ex parte Devas, re Kenton*, 1834. 4 Dea. & Chit. 366; S. C. 1 M. & A. 420.

A. & B., partners, were solicitors to the commission. More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee till within six years. Beyond the six years *A. & B.* (upon an agreement that *A.* should pay all the debts) dissolved partnership, and the assignee, with knowledge of this fact, continued to employ *A.* alone as the solicitor for the commission, and no attempt was made to charge *B.* with the monies received by *A. & B.* till very lately, viz. when an official assignee was appointed. Nor had *B.* ever acknowledged any liability to account:—Held, first, that, as between *B.* and the creditors, neither the statute of limitations, nor laches, nor other conduct of the assignee, would operate as a bar, *A. & B.* being solicitors to the commission. But, secondly, that as the assignee was able to recoup

the estate, he could not, under such circumstances of conduct on his part, call on *B.* to account. *A.* had become bankrupt; *semble*, nevertheless, that he or his assignees were necessary parties. *Ex parte Gould, re Robertson*, 1834. 4 Dea. & Chit. 547.

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It was deposed, that two out of

three provisional syndics may, by the law of France, sue to recover debts due to the bankrupt, and without the previous authority of the Juge Commissaire:—Held, that they may so sue in this country, unless the French law be shown to be contrary:—Held also, that the act of the two syndics sufficiently implied the absence or want of consent of the third, without showing his absence or want of consent. The declaration averred, that a party, a Frenchman, was a bankrupt. The evidence was, that he was only “*en etat de faillite*” or insolvent:—Held no variance, as the English “*bankrupt*” does not appear identical with the French “*banqueroute*.” *Alixon v. Furnival*, 4 Tyr. 751: *S. C.* 1 Crom. M. & R. 277.

PARTNERS, PARTNERSHIP AND PARTNERSHIP ACCOUNTS.

See also JOINT STOCK COMPANY—
SUBSTITUTION OF DEBTOR.

A. deposits with *B.*, as a security for the repayment of a loan of money, the attested copy of the lease of a coal mine granted to *A.* and four other persons, as tenants in common. The mine was worked by them according to the stipulations of certain articles of partnership, which contained a proviso, that if any one partner wished to dispose of his share the others should have a right of preemption:—Held, (*Sir J. Cross dissent.*,) that the usual order could not be made for the sale of *A.*'s share in this property, as in

on the defendants' premises for use in constructing the works, should be a security for such advances. Those advances always exceeded the value of the property so on the premises. *S.* became bankrupt before the works were completed, upon which the defendants erased his marks on the engines, materials, implements, &c. then on their premises. In trover, brought by the assignees of *S.* against the defendants, to recover such engines, materials &c.:—Held, first, that the arbitrator had no power to award that the defendants were entitled to prove against the estate of *S.* for the sum advanced to him by them beyond the value of the work done and materials furnished by him, and of the engines, &c. agreed to stand as security. Secondly, That the plaintiffs were not entitled to recover for extra work done by the bankrupt. Thirdly, That as there had been such a possession of the engines, materials, &c. by the defendants as would support the lien, which it was the effect of the bankrupt's agreement to confer on them, the plaintiffs were only entitled to recover for such materials, &c. as were brought on the defendants' premises after the act of bankruptcy. Fourthly, That payments to the bankrupt by the defendants, after the latter portions of materials were brought on the premises, could not be considered as payments for those particular goods in the course of business, but as general advances only, so that they could not be retained by

the defendants under 6 G. 4. c. 16. s. 82. *Crowfoot v. London Dock Company*, 4 Tyr. 967.

W. shipped at Leghorn twenty-three casks of oil, on account and by the order of *L.* at Liverpool, and transmitted to him a bill of lading. Before the arrival of the oil, *L.* indorsed the bill of lading, and deposited it with *H.*, who advanced money on it, having previously advanced money on other goods (the property of *L.*) deposited with him. On the arrival of the oil, *L.* having previously become bankrupt, and *W.* not having been paid for it, *W.*'s agents claimed it of the master of the ship; but the latter delivered it to *H.*, who afterwards sold the goods of *L.* as well as the oil of *W.* The net proceeds of the goods belonging to *L.* were sufficient to satisfy the debt due from *L.* to *H.* *H.* paid himself his debt, and deposited the net proceeds of *W.*'s oil with a third person, to abide the event of the award of an arbitrator, to whom all disputes between *W.* and the assignees of *L.* were referred. The arbitrator having stated the above facts on his award for the opinion of this Court:—Held, that *W.*, the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of *L.*, because the property in and the right to the possession was then vested in *H.*, the indorsee of the bill of lading, for value; and further, that *W.* had not, by reason of such claim, any legal

right to the possession of the goods after *H.*'s lien was satisfied: but that in a Court of Equity such transfer to *H.* would be treated as a pledge or mortgage only, and therefore *W.*, by his attempted stoppage in transitu, acquired a right to the goods in equity, subject to *H.*'s lien against the assignees of *L.*:—Held, secondly, that *W.*, by means of his goods, had become surety to *H.* for *L.*'s debt, and had a clear equity to oblige *H.* to pay his debt out of *L.*'s own goods deposited with him in ease of such surety; and all the goods both of *W.* and *L.* having been sold, *W.* might insist on the proceeds of *L.*'s goods being appropriated to payment of the debt: and, therefore, that *W.* was entitled to have all the proceeds of the oil paid over to him. *Re the Arbitration between Westzinthus and Assignees of Lapage and Co.: and between Rogers and Co. and the same Assignees*, 5 Barn. & Adol. 817.

LIMITATIONS, STATUTE OF.

See STATUTE OF LIMITATIONS.

LORD CHANCELLOR.

See also ORDER OF LORD CHANCELLOR.

The Lord Chancellor's jurisdiction to annul a fiat still subsists. *Re Chambers*, 1835. 4 Dea. & Chit. 578.

The Lord Chancellor is not liable to an action in respect of an order of commitment made by him in bankruptcy, even admitting such order to

have been irregular. *Dicas v. Lord Brougham and Vaux*, 1 Moody & Rob. 309.

LOCUS STANDI.

An uncertificated bankrupt cannot petition that his assignees may be ordered to account, without alleging that his estate will produce a surplus, after paying 20s. in the pound. *Ex parte* and *re Ryley*, 1834. 4 Dea. & Chit. 50.

On a petition to stay the certificate by a creditor, at whose suit the bankrupt is in custody, the bankrupt must be discharged before the petition can be heard. *Ex parte Green, re Armistead*, 1834. 4 Dea. & Chit. 112; S. C. 2 M. & A. 31.

A creditor, who becomes bankrupt after proving his debt, may nevertheless petition to stay the first bankrupt's certificate, if the assignees of the creditor do not interfere. *Ex parte Taylor, re Percival*, 1834. 4 Dea. & Ch. 125; S. C. 2 M. & A. 36.

Although a fiat is fraudulently sued out, yet a creditor, whose debt is impeachable on the ground of usury, cannot petition to supersede it. *Ex parte Jarman, re Theed*, 1835. 4 Dea. & Chit. 393; S. C. 2 M. & A. 119.

On petition to stay certificate, it must appear from the petition itself that the party applying is a creditor; if it appear merely inferentially, that is sufficient: if it merely so appear from the affidavits in support, that is insufficient; and no amendment of peti-

tion to stay certificate allowed. *Ex parte Robinson, re Case*, 1854. 4 Dea. & Chit. 499.

A country fiat having been directed to three barristers, under the 1 & 2 Will. 4. c. 56., the solicitor neglected (on account of the expense) to summon one of them, the petitioner, who throughout evinced his willingness and claimed the right to attend. Held, that the Court had jurisdiction, at the instance of the barrister, to interfere: and ordered that the solicitor should summon such barrister in future, and recompence him for all fees which he would otherwise have received. *Ex parte Douglass*, 4 Dea. & Chit. 768; S. C. 2 M. & A. 218. This is followed in *Ex parte Williams*, 2 M. & A. 616.

Barrister cannot petition to have his name inserted in the commission. *Ex parte Ward*, 2 M. & A. 219, n.; but see *Ex parte Douglass*, 4 D. & C. 768; 2 M. & A. 218.

MAINTENANCE.

See BANKRUPT'S ALLOWANCE FOR.

MASTER AND SERVANT.

A commission of bankrupt does not operate as a dissolution of the contract of hiring between the bankrupt and his clerk. If the clerk, being hired for a year, continue in the bankrupt's office after the bankruptcy, and then in the middle of the year, by mutual consent, the contract be rescinded, on the understanding that the clerk is to be paid rateably

for his services during the current year, the clerk is not barred by the certificate from recovering all the wages due from the expiration of the year last before the commission up to the time of rescinding, no part of such wages being provable under the commission. The provision in 6 G. 4. c. 16. s. 48., for payment of clerks and servants, makes no difference in this respect. A jury may infer such an understanding from the clerk having continued after the bankruptcy in the bankrupt's office as long as the bankrupt's brother remained there managing the business (as he had also done for a month before the bankruptcy), although, in fact, there was nothing for the clerk to do after the bankruptcy. *Thomas v. Williams*, 1 Ad. & El. 685.

MESNE PROFITS.

See INTERMEDIATE PROFITS.

MEETING OF CREDITORS.

Before an assignee applies for leave to bid at the sale of the bankrupt's property, he must call a meeting of the creditors, for the purpose of assenting to, or dissenting from, such proposed bidding. *Ex parte Molineux, re Blight*, 1835. 4 Dea. & Ch. 460; S. C. 2 M. & A. 245.

MEMORANDUM OF DEPOSIT.

A letter written some months after the deposit of deeds, acknowledging the purpose for which they

were deposited, is a sufficient memorandum in writing to entitle an equitable mortgagee to his costs out of the produce of the sale. *Ex parte Reynolds, re Moore*, 1835. 4 Dea. & Chit. 278; S. C. 2 M. & A. 104.

In a case of doubt, and where there is no memorandum in writing accompanying the deposit of deeds, the Court leans against the deposit as a security for an antecedent debt, though it favours it in regard to subsequent advances. *Ex parte Martin, re Cowderoy*, 1835. 4 Dea. & Chit. 457; S. C. 2 M. & A. 243.

MINUTES.

See VARYING MINUTE.

MORTGAGE & MORTGAGEE.

See also EQUITABLE MORTGAGE—
EQUITY OF REDEMPTION.

On the sale of the bankrupt's mortgaged property, the Court, in the order for leave to bid, will not direct that the mortgagee shall not be required to make any deposit. *Ex parte Tatham, re Sheppard*, 1834. 4 Dea. & Chit. 360; S. C. 1 M. & A. 335.

The bankrupt kept an account with A., B., & C., as bankers, who took into partnership the son of C.; after which the bankrupt executed a legal mortgage to A., B., & C., for securing the repayment of the loan of 6000*l*. Subsequently to this, the bankrupt addressed a letter to Messrs. A., B., & C., authorizing them to

consider all the securities they then held as responsible for any advances made, or to be made by them to the bankrupt:—Held, that this letter must be taken to have been addressed by the bankrupt to the four partners, and amounted to an equitable mortgage to the four of the previous legal mortgage to the three, operating as a security for all the advances made either by the three or the four partners. *Ex parte Parr, re Burron*, 1835. 4 Dea. & Chit. 426.

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Where real property "with its appurtenances" (without other evidence of intention) was mortgaged by the owner of the fee, articles of furniture, as rolling maps, affixed before and after the mortgage to the freehold, although they might have been removable as between a landlord and tenant, and although he continued in possession up to the time of his bankruptcy, passed by the mortgage, and were taken out of the order and disposition of the bankrupt owner. Whatever is affixed to freehold by the owner of the inheritance is to be considered as a fixture till severed by him; and whether so affixed before or after a mortgage,

passes absolutely to the mortgagee. *Ex parte Belcher*, 4 Dea. & Chit. 703; S. C. 2 M. & A. 160.

If legal mortgage is ordered by the Commissioners to be sold, the assignees are entitled to the rents to the time of sale, unless the mortgagee makes an actual entry, or gives notice to the tenant to pay the rent to him. *Ex parte Living, re Tombs*, 2 M. & A. 223.

MOTION GENERALLY.

See EX PARTE MOTION.

Where a party wishes an essential alteration to be made in the judgment of the Court, as pronounced on a former hearing, he must not apply to amend the minutes of the order, but must petition for a re-hearing. *Ex parte Soper, re Salter*, 1835. 4 Dea. & Chit. 275; S. C. 2 M. & A. 58.

Petition in paper of day; motion made, on notice, that it might stand over to amend, by adding a party respondent. Party moving must pay costs of all parties served with notice; but petition not being called on, without costs of the day. *Ex parte Story, re Johnson*, 1834. 4 Dea. & Chit. 504.

What done by.

Substantial variations in order cannot be effected by motion, but only on petition to re-hear. *Ex parte Soper, re Salter*, 1835. 4 Dea. & Chit. 569.

Order for four-day order, to-

wards commitment, must be prayed by petition, not motion, and certificate of Registrar of non-conformity should be dated the very day of the application for the short order. *Ex parte Myers, re Sudell*, 1835. 4 Dea. & Chit. 579.

Order cannot be rescinded on motion. *Re Walker*, 2 M. & A. 267.

MOTION OF COURSE.

See also EX PARTE MOTION.

Affidavits referred for scandal on motion of course. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Chit. 217.

Motion to confirm report as to scandal in affidavits is a motion of course. *Ex parte Hetherington, re Glossop*, 1834. 4 Dea. & Chit. 223.

MULTIFARIOUSNESS.

Multifariousness is not sufficient cause for the absolute dismissal of a petition; *aliter*, where the defect is want of proper parties. *Ex parte Devas, re Kenton*, 1834. 4 Dea. & Chit. 366; S. C. 1 M. & A. 420.

NEGLECT.

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NOTICE.

On a deposit of a policy of assurance by way of equitable mortgage, the onus does not lie on the mortgagee, to show that notice of the deposit was given to the office

before the act of bankruptcy,—but with the assignees, to show that it was not. *Ex parte* and *re Stevens*, 1834. 4 Dea. & Chit. 117.

A bankrupt deposits with the petitioner, by way of equitable mortgage, an assignment, which had been made to the bankrupt, of a reversionary interest under a will; no notice of the assignment having been given to the executors either by the bankrupt or by the petitioner:—Held, that the property was not within the order and disposition of the bankrupt as reputed owner. *Ex parte Newton, re Goren*, 1834. 4 Dea. & Chit. 138; *S. C.* 2 M. & A. 51.

A party, to whom the bankrupt had assigned a policy of assurance, sends an agent to the office for the purpose of paying the annual premium, who, in course of conversation with one of the clerks in the office, tells him of the policy having been so assigned:—Held, that this was not sufficient notice to the insurance office. *Ex parte Carbis, re Craggon*, 1834. 4 Dea. & Chit. 354; *S. C.* 1 M. & A. 693, *n.*

A notice to produce the proceedings must be served on the assignees, not on the bankrupt. *Ex parte* and *re Daly*, 1834. 4 Dea. & Chit. 364.

The bankrupt being one of the directors of a life assurance office, deposits a policy of that office with his bankers, as a collateral security for advances, one of the bankers

being also one of the auditors of the assurance office:—Held, that this was sufficient notice to the office of the transfer of the bankrupt's interest in the policy, to prevent the claim of reputed ownership. *Ex parte Waithman, re Raikes*, 1835. 4 Dea. & Chit. 412; *S. C.* 2 M. & A. 364.

Where the owner of shares in an insurance company transfers them by way of equitable mortgage, though he does not observe the rules of the company in regard to the mode of transfer, and though he continues to act as director without having any other shares than those assigned (the being a shareholder to a certain extent alone entitling him so to act); yet if the transferee gives notice to the company of his mortgage, and the owner becomes bankrupt, they are taken out of his order and disposition; especially where the company make entry of the notice in their books in such a manner as to evince their knowledge that such owner could not further dispose of the shares. Bare notice in such cases seems sufficient. *Ex parte Masterman*, 4 Dea. & Ch. 751; *S. C.* 2 M. & A. 209.

If mortgagee be himself the trustee to whom notice was requisite, the transaction itself is notice enough to prevent reputed ownership. *Ex parte Smart, re Holt*, 2 M. & A. 60.

If legal mortgage is ordered by Commissioners to be sold, the assignees are entitled to the rents to the time of the sale, unless the mort-

gatee makes an actual entry, or gives notice to tenant to pay rent to him. *Ex parte Living, re Tombs*, 2 M. & A. 223.

To assumpsit, by two plaintiffs, for goods sold, &c., defendant pleaded the bankruptcy of one. Replication, that, before the bankruptcy, the bankrupt plaintiff assigned to the other all his interest in the debt, and that the bankrupt now sued only as trustee for his co-plaintiff. The Court was of opinion that the replication was bad, for not stating that the debtor had had notice of the supposed assignment, although the defendant had pleaded over without alleging the want of notice. But the plaintiff had leave to amend. *Dean v. James*, 1 Ad. & El. 809.

Under the thirtieth section of the Insolvent Debtors' Act (7 G. 4. c. 57.) a debt due to the insolvent will pass to the provisional assignee, although it has been assigned to a third party before the insolvent's imprisonment, if notice of such assignment was not given to the debtor before such imprisonment. *Buck v. Lee*, 1 Ad. & El. 804.

To an action by the assignees of a bankrupt ship-owner for the freight of a voyage to India, accruing to him before his bankruptcy, the defendant pleaded that the ship-owner, before his bankruptcy, assigned by deed the freight in question to I., in trust to discharge a debt due from the ship-owner to I., and to pay the surplus, if any, to the ship-owner;

that the defendant had notice of such assignment, and that the freight, which was not sufficient to discharge the debt, had been demanded of him by I.:—Held, a good bar to the action. *Lestic v. Guthrie*, 1 Bing. N. C. 697.

OFFICER OF COURT.

Independently of the provisions in the acts of parliament, the Court of Review has a general jurisdiction to refer the bill of any solicitor of that Court for taxation. *Ex parte Copeland, re Burnand*, 1834. 4 Dea. & Chit. 86.

A creditor whose debt arises on a lost bill of exchange, issues a fiat, which he cannot support, in consequence of his inability to prove the loss of the bill, so as to let in satisfactory evidence of its contents; upon which the assignees obtain an order, that a renewed fiat may issue on the debt of another creditor:—Held, that the petitioning creditor under the new fiat was not exonerated, under these circumstances, from making the payments of 10*l.* and 20*l.* to the Secretary of Bankrupts and the Accountant General, under the provisions of the 45th and 46th sections of Bankruptcy Court Act. *Ex parte Osborne, re Gunning*, 1835. 4 Dea. & Chit. 398; S. C. 2 M. & A. 140.

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PARTIES.

Multifariousness is not sufficient cause for the absolute dismissal of a petition; *aliter*, where the defect is want of proper parties. *Ex parte Dexas, re Kenton*, 1834. 4 Dea. & Chit. 366; S. C. 1 M. & A. 420.

A. & B., partners, were solicitors to the commission. More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee till within six years. Beyond the six years *A. & B.* (upon an agreement that *A.* should pay all the debts) dissolved partnership, and the assignee, with knowledge of this fact, continued to employ *A.* alone as the solicitor for the commission, and no attempt was made to charge *B.* with the monies received by *A. & B.* till very lately, viz. when an official assignee was appointed. Nor had *B.* ever acknowledged any liability to account:—Held, first, that, as between *B.* and the creditors, neither the statute of limitations, nor laches, nor other conduct of the assignee, would operate as a bar, *A. & B.* being solicitors to the commission. But, secondly, that as the assignee was able to recoup

the estate, he could not, under such circumstances of conduct on his part, call on *B.* to account. *A.* had become bankrupt; *semble*, nevertheless, that he or his assignees were necessary parties. *Ex parte Gould, re Robertson*, 1834. 4 Dea. & Chit. 547.

Specific performance of sale under Lord *Loughborough's* Order decreed by this Court, although the following objections were urged: viz. 1st. That particulars of sale did not state that sale took place under order of Court; it appearing that purchaser must have known the fact that it was so. 2d. That a third mortgagee of equity of redemption and an assignee on prior insolvency of bankrupt, were not parties. 3d. Though the petitioning creditor's debt on which this fiat was founded was contained in the schedule in prior insolvency; especially as the purchaser was presumed to have known of all the objections to the title, and was held to have waived them by granting a lease of the premises purchased by him before the title to him was completed. *Quære*, whether this Court has jurisdiction to direct specific performance of contract of purchase of bankrupt's property, where the purchaser did not know, and had no means of knowing, that the sale took place under order of this Court or of Commissioners? *Ex parte Sidebotham*, 4 Dea. & Chit. 693; *S. C.* 2 M. & A. 146.

It was deposed, that two out of

three provisional syndics may, by the law of France, sue to recover debts due to the bankrupt, and without the previous authority of the Juge Commissaire:—Held, that they may so sue in this country, unless the French law be shown to be contrary:—Held also, that the act of the two syndics sufficiently implied the absence or want of consent of the third, without showing his absence or want of consent. The declaration averred, that a party, a Frenchman, was a bankrupt. The evidence was, that he was only “en etat de faillitè” or insolvent:—Held no variance, as the English “bankrupt” does not appear identical with the French “banqueroute.” *Alison v. Furnival*, 4 Tyr. 751: *S. C.* 1 Crom. M. & R. 277.

PARTNERS, PARTNERSHIP AND PARTNERSHIP ACCOUNTS.

See also JOINT STOCK COMPANY—
SUBSTITUTION OF DEBTOR.

A. deposits with *B.*, as a security for the repayment of a loan of money, the attested copy of the lease of a coal mine granted to *A.* and four other persons, as tenants in common. The mine was worked by them according to the stipulations of certain articles of partnership, which contained a proviso, that if any one partner wished to dispose of his share the others should have a right of preemption:—Held, (*Sir J. Cross dissent.*) that the usual order could not be made for the sale of *A.'s* share in this property, as in

the ordinary case of an equitable mortgage, it being necessary that the partnership accounts should first be taken, for the purpose of ascertaining *A.*'s share in the property, which this Court had no jurisdiction to do, the other partners not being before the Court. *Ex parte Broadbent, re Borron*, 1834. 4 Dea. & Ch. 3; S. C. 1 M. & A. 635.

A., B., & C., agree to dissolve their partnership, and that *A.* shall receive 560*l.* in discharge of his share in the concern, of which 50*l.* was agreed to be paid at the date of the agreement, and the remaining 500*l.* by five several bills payable at future dates. Separate fiats are subsequently issued against *A., B., & C.*; and the stock and effects which originally belonged to the firm of the three are taken possession of and sold by the assignee, under the separate fiat against *B.* Held, that the agreement of the dissolution of the partnership was executed, and not executory; and that the joint creditors of *A., B., & C.*, had no lien on such stock and effects for the payment of the debts owing to them at the time of *A.*'s retiring from the partnership. *Ex parte Clarkson, re Fear*, 4 Dea. & Ch. 56; S. C. 2 M. & A. 4.

By the rules of an Insurance Company, no person, except a director, was permitted to hold more than two shares in his own name; but no rule prevented a person from being beneficially entitled to more

than two shares, by holding them in the name of another party. The petitioner, who was already the holder of two shares, having purchased two other shares, caused them to be entered in the name of the bankrupt in the Company's books, with the knowledge of one of the directors and the actuary. The bankrupt signed a declaration of trust, that he held the shares as trustee for the petitioner, but no notice of the trust was taken in the books of the Company; and he continued to receive the dividends on the shares, accounting for them from time to time to the petitioner, up to the period of his bankruptcy, when the shares were still standing in his name. Held, that the shares did not pass to his assignees, as being in his order and disposition at the time of his bankruptcy. *Ex parte Watkins, re Kidder*, 1834. 4 Dea. & Ch. 87; S. C. 1 M. & A. 689.

By a clause in the deed of settlement of a banking company, it was stipulated that the company should have a lien on the share of such proprietors as were customers and indebted to the bank, and that no share should be transferred without the consent of the directors; and an abstract of these provisions was indorsed on the certificate of the share held by each proprietor. The bankrupt, at the time of his bankruptcy, was the owner of thirty of these shares, and had in his possession the certificates of ownership thus indorsed, being then largely indebted to the

bank for advances :—Held, that these shares did not pass to his assignee under the clause of reputed ownership in the Bankrupt Act, so as to defeat the lien of the bank, which had been provided for in the deed. *Ex parte Plant, re Butterworth*, 1835. 4 Dea. & Ch. 160.

Proof cannot be made by the joint estate against the separate estate, except in the case of a fraudulent abstraction from joint funds by one of the partners ; and not then, if there had been any waiver of the tortious act by the other partner, so as to reduce it to a matter of contract. *Ex parte Turner, re Mackenzie*, 1833. 4 Dea. & Chit. 169 ; S. C. 1 M. & A. 54.

The bankrupt kept an account with A., B. & C., as bankers, who afterwards took into partnership the son of C. : after which, the bankrupt executed a legal mortgage to A., B. & C. for securing the repayment of the loan of 6000*l.* Subsequently to this, the bankrupt addressed a letter to Messrs. A., B. & Co., authorizing them to consider all the securities they then held as responsible for any advances made, or to be made, by them to the bankrupt :—Held, that this letter must be taken to have been addressed by the bankrupt to the four partners, and amounted to an equitable mortgage to the four, of the previous legal mortgage to the three, operating as a security for all the advances made either by the three or the four partners. *Ex parte*

Parr, re Borron, 1835. 4 Dea. & Chit. 426.

A former partner, there being partnership debts unpaid, cannot petition to prove the balance of accounts : *à fortiori* not to stay certificate. *Ex parte Robinson, re Case*, 1834. 4 Dea. & Chit. 499.

On the formation of a partnership between A. and B., A. lends to B., B.'s proportion of the capital, and A. is to receive it again, and interest thereon, out of B.'s share of the profits. B. assigns property to C. in trust to secure to A. the money lent by him, and covenants to pay C. the amount. After an act of bankruptcy by B., known to A., A. files a bill for a dissolution and account of partnership and for payment of the debt :—Held, that A. and C. could not, after such election, sue out a fiat against B. founded on that debt, A. having elected his remedy and treated the debt as mixed up with the partnership accounts. *Ex parte and re Gray*, 4 Dea. & Chit. 778 ; S. C. 2 M. & A. 283.

PAYMENT.

See also PROTECTED CONTRACTS, &c.

Although the petitioning creditor is not entitled to an order on the assignees to pay the amount of his costs, before they have received money under the fiat, he is nevertheless entitled to an inquiry, whether any assets have been received by the assignees. *Ex parte Abram, re Dunna*, 1835. 4 Dea. & Ch. 401.

Where the petitioning creditor's bill, after being taxed by the Commissioners, had been paid, and the assignees' accounts had been audited, for the space of six years, the Court refused to order a retaxation of it by the Registrar. *Ex parte Christy, re Barrow*, 1835. 4 Dea. & Ch. 414.

PAYMENT INTO COURT.

On a petition for a supersedeas, with consent of creditors, where one of the creditors could not be found, an order was made for the supersedeas, the petitioner undertaking to pay into Court the amount of the debt of the outstanding creditor. *Ex parte and re Crowther*, 1834. 4 Dea. & Ch. 31.

Order of committal for disobedience to order to pay into Court, will not be stayed under any circumstances, unless party has paid the money in, or is ready to do so. *Ex parte Birkett, re Fox*; *Ex parte and re Fox*, 1834. 4 Dea. & Ch. 503.

PETITION.

See also CROSS PETITION—BANKRUPT'S CERTIFICATE—TRANSFER OF PETITION.

Who may, and what done by.

Where a party purchases of a creditor all his right to the dividends and interest on his proof, *semble*, that such party cannot proceed against the assignees by petition for an order to pay to him the dividends on the proof, but must be left to the ordinary

means of enforcing the contract by action at law, or suit in equity. *Ex parte Richards, re Trevor*, 1835. 4 Dea. & Ch. 190.

Where a party wishes an essential alteration to be made in the judgment of the Court, as pronounced on a former hearing, he must not apply to amend the minutes of the order, but must petition for a rehearing. *Ex parte Soper, re Salter*, 1835. 4 Dea. & Ch. 275; S. C. 2 M. & A. 58.

The Court has a general jurisdiction to entertain questions on the legality of commitment by Commissioners upon petition, without habeas corpus, and without the warrant of commitment being before it; especially where the objections to the committal would not appear on the face of the warrant. *Dubit.* Sir J. Cross, as to the production of the warrant. *Quære*, whether this Court has any jurisdiction to issue the writ of habeas corpus? *Ex parte and re Jones*, 1834. 4 Dea. & Chit. 536.

Substantial variations in order cannot be effected by motion, but only on petition to rehear. *Ex parte Soper, re Salter*, 1835. 4 Dea. & Ch. 569.

Order for four-day order, towards commitment, must be prayed by petition not motion, and certificate of Registrar of non-conformity, should be dated the very day of the application for the short order. *Ex parte Myers, re Sudell*, 1835. 4 Dea. & Ch. 579.

A country fiat having been directed to three barristers, under the 1 & 2 *Will.* 4. c. 56., the solicitor neglected (on account of the expense) to summon one of them, the petitioner, who throughout evinced his willingness and claimed the right to attend:—Held, that the Court had jurisdiction at the instance of the barrister to interfere: and ordered that the solicitor should summon such barrister in future, and recompence him for all fees which he would otherwise have received. *Ex parte Douglass*, 4 Dea. & Ch. 768; *S. C.* 2 M. & A. 218. This is followed in *Ex parte Williams*, 2 M. & A. 616.

Form of.

Where the amount of a bill appears, on the face of it, to be excessive, objectionable items need not be pointed out, on an application by a creditor to have it taxed. *Ex parte Copeland, re Burnand*, 1834. 4 Dea. & Ch. 86.

Costs are always given against any party appearing on a petition, who endeavours to support a case of fraud, whether the costs are prayed or not. *Ex parte Taylor, re Percival*, 1834. 4 Dea. & Chit. 125; *S. C.* 2 M. & A. 36.

Multifariousness is not sufficient cause for the absolute dismissal of a petition; *aliter*, where the defect is want of proper parties. *Ex parte Devas, re Kenton*, 1834. 4 Dea. & Ch. 366; *S. C.* 1 M. & A. 420.

Where an assignee applies to have a solicitor's bill taxed, for business done before the choice of assignees, which is not included in the bill taxed by the Commissioners, the petition should state the nature of the business, and when it was done, and the proceedings should also be in Court. *Ex parte Cass, re Rivers*, 1835. 4 Dea. & Ch. 273; *S. C.* 2 M. & A. 170. See this case on a subsequent occasion, *id.*

On petition to prove and stay certificate, it is not necessary to charge directly what debt was tendered for proof to the Commissioner, or when it was rejected. *Ex parte Robinson, re Case*, 1834. 4 Dea. & Ch. 499.

On petition to stay certificate, it must appear from the petition itself that the party applying is a creditor; if it appear merely inferentially, that is sufficient; if it merely so appear from the affidavits in support, that is insufficient; and no amendment of petition to stay certificate allowed. *Ex parte Robinson, re Case*, 1834. 4 Dea. & Ch. 499.

Ex parte.

See also EX PARTE MOTIONS, &c.

Application for warrant of commitment for disobedience of a four-day order is *ex parte*, and quite of course. *Ex parte Hunt, re Fox*, 1834. 4 Dea. & Ch. 503.

Dismissal of.

Multifariousness is not sufficient cause for the absolute dismissal of a

petition; *aliter*, where the defect is want of proper parties. *Ex parte Devas, re Kenton*, 1834. 4 Dea. & Ch. 366; *S. C.* 1 M. & A. 420.

Advancing and Adjourning.

A cross-petition by the bankrupt for allowance of the certificate, will not be advanced on motion of course, pending the reference for scandal, of affidavits filed in answer to the petition to stay the certificate, on the ground that the latter petition was improperly served. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Ch. 217.

Where no sufficient advantage will be gained by a *vivâ voce* examination, the Court will not, after a petition has been opened, and the petitioner has filed affidavits in reply, order the petition to stand over, on his application for that purpose. *Ex parte Jarman, re Theed*, 1835. 4 Dea. & Chit. 393; *S. C.* 2 M. & A. 119.

Where petitioner files no affidavits in support, but two days before hearing served notice to examine witnesses on respondent 20 miles from London, Court refused application of respondent to postpone hearing, so as to procure witnesses in answer, till after petitioners' witnesses were examined. *Ex parte and re Lavender*, 1834. 4 Dea. & Chit. 485.

Petition in paper of day, motion made, on notice, that it might stand over to amend, by adding a party respondent. Party moving must pay

costs of all parties served with notice; but petition not being called on, without costs of the day. *Ex parte Story, re Johnson*, 1834. 4 Dea. & Ch. 504.

Petition not to stand over to answer affidavits when there is laches. *Ex parte Sidebotham, re Barrington*, 2 M. & A. 79.

Service.

See also SERVICE.

A cross-petition by the bankrupt for allowance of the certificate, will not be advanced on motion of course, pending the reference for scandal, of affidavits filed in answer to the petition to stay the certificate, on the ground that the latter petition was improperly served. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Ch. 217.

As a general rule, a petition to stay certificate must be served on bankrupt two clear days before the day for which it is answered. But where a petition to stay certificate was answered for the 9th December, and on the 7th the bankrupt's solicitor requested the petitioner's solicitor to postpone the hearing of the petition for a week, and undertook to serve it on the bankrupt: *semble*, the bankrupt could not avail himself of the objection to service. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Ch. 218; *S. C.* 1 M. & A. 607.

Service of petition to stay certificate not properly supported, where affidavit merely states inability to

serve bankrupt personally, but that bankrupt's solicitor had acknowledged bankrupt to be fully aware of petition and its nature. *Ex parte Levy, re Glossop*, 1835. 4 Dea. & Ch. 224.

If Commissioners certify that a consolidation will be beneficial, the assignees need not be served. *Ex parte Smith, re Shaw*, 2 M. & A. 60.

If a fiat is impounded on the application of *A.*, a petition for its delivery out presented by *B.* must be served on *A.* *Ex parte Martin, re Kenton*, 2 M. & A. 293.

On petition to annul on consent, under 6 Geo. 4. c. 16. ss. 133, 134., the assignees must be served. *Ex parte and re Race*, 2 M. & A. 242.

To Annul and Supersede.

See also FIAT, ANNULING.

Upon bankrupt's petition to supersede, depositions of trading and act of bankruptcy read in Court, so as to give him an opportunity of answering them. *Ex parte and re Lavender*, 1834. 4 Dea. & Chit. 486.

The Court will in general rehear petitions and rescind former orders, upon fresh evidence tendered, but not where such orders are made upon petitions to stay certificate, or to supersede or annul fiats. *Ex parte and re Lavender*, 1835. 4 Dea. & Chit. 497.

Where the bankrupt vexatiously petitions to supersede for want of an act of bankruptcy, which he was evidently aware of having committed,

the petition was dismissed with costs. *Ex parte and re Thompson*, 1834. 4 Dea. & Chit. 534.

Trustee, under deed of trust, by a former petition, upholding the trust and praying to annul fiat, and failing, but consenting to have the account against him taken on that petition by reference, ordered to pay costs of that petition, and to pay balance in his hands, under trust-deed, to assignees, with interest at 4l. per cent. from date of order of reference, although there was no evidence of interest having been made. Costs of reference to be paid by estate. *Ex parte Harding*, 4 Dea. & Ch. 793.

On petition to annul on consent under 6 G. 4. c. 16. ss. 133, 134., the assignees must be served. *Ex parte and re Race*, 2 M. & A. 242.

To Expunge.

See also PROOF, EXPUNGING.

On petition by assignees to expunge a proof, the examination of the bankrupt before the Commissioner, taken at the time the proof was admitted, is receivable in evidence. *Ex parte Freeman, re Clay*, 1835. 4 Dea. & Chit. 404.

To Re-hear.

See also RE-HEARING.

The Court will not vary the minutes of a former order, which has been pronounced more than three months, except on a petition for rehearing. *Ex parte Wilson, re Butterworth*, 1835. 4 Dea. & Chit. 156.

PETITIONING CREDITOR.

Although the petitioning creditor is not entitled to an order on the assignees to pay the amount of his costs before they have received money under the fiat; he is nevertheless entitled to an inquiry whether any assets have been received by the assignees. *Ex parte Abram, re Dunna*, 1835. 4 Dea. & Chit. 401.

On a petition for the substitution of a debt in lieu of the petitioning creditor's debt, under the 6 G. 4. c. 16. s. 18., the costs of the proceeding must be paid by the petitioning creditor, and not out of the bankrupt's estate. *Ex parte Hayne, re Jacobs*, 1835. 4 Dea. & Chit. 403.

Where time for opening town fiat is nearly run out, Court will not, at instance of petitioning creditor, supersede it, and issue a country fiat for alleged convenience of creditors. *Ex parte Bell, re Riley*, 1834. 4 Dea. & Ch. 481.

The petitioning creditor issued the fiat on a debt of 700*l.*, but the greater part being contracted during the bankrupt's minority, and not for necessities, the debt was reduced below 100*l.*, and was therefore insufficient to support the fiat. But the petitioning creditor had also accepted bills for the accommodation of the bankrupt, which having been indorsed by the bankrupt to *A.*, *A.* proved them under the fiat. The petitioning creditor subsequently paid

these bills:—Held that, on indemnifying *A.*, and on presenting a petition in the name of *A.* for that purpose, the petitioning creditor was entitled, under the 6 G. 4. c. 16. ss. 18 & 52, as a surety paying the debt, to substitute the debt so proved on the bills by *A.* for the original petitioning creditor's debt, so as to support the fiat notwithstanding the words "any other creditor," in the 18th section. *Ex parte* and *re Rogers*, 1835. 4 Dea. & Chit. 623; *S. C.* 2 M. & A. 153.

The fees payable under 1 & 2 Will. 4. c. 56. ss. 45 & 46. to the secretary of bankrupts, not dispensed with where a country fiat was annulled because Commissioners declined to act, and a new fiat was proposed to be taken out in London in lieu of it. *In re Willman*, 4 Dea. & Chit. 810; *S. C.* 2 M. & A. 292.

The declarations of the petitioning creditor (since dead) made after the commission, are not evidence against the assignees, in an issue to try whether the commission was concerted between the petitioning creditor, the bankrupt, and the attorney. *Harwood v. Keys*, 1 Moody & Rob. 204.

If trader take the benefit of the Insolvent Act, a creditor, whose debt is inserted in the schedule, may afterwards issue a fit on that debt against the trader. *Ex parte* and *re Barington*, 2 M. & A. 255.

New fiat issued on petition of same petitioning creditor before time

for opening had expired, he having been unable to prove act of bankruptcy before, but one having been since committed. *Ex parte Llewellyn re Williams*, 2 M. & A. 298.

PETITIONING CREDITOR'S BILL.

Where the petitioning creditor's bill, after being taxed by the Commissioners, had been paid, and the assignees' accounts had been audited, for the space of six years, the Court refused to order a re-taxation of it by the Registrar. *Ex parte Christy, re Barrow*, 1835. 4 Dea. & Chit. 414.

PETITIONING CREDITOR'S DEBT.

On the formation of a partnership between *A.* and *B.*, *A.* lends to *B.*, *B.*'s proportion of the capital, and *A.* is to receive it again, and interest thereon, out of *B.*'s share of the profits. *B.* assigns property to *C.* in trust to secure to *A.* the money lent by him, and covenants to pay *C.* the amount. After an act of bankruptcy by *B.*, known to *A.*, *A.* files a bill for a dissolution and account of partnership, and for payment of the debt:—Held, that *A.* and *C.* could not, after such election, sue out a fiat against *B.* founded on that debt, *A.* having elected his remedy and treated the debt as mixed up with the partnership accounts. *Semble*, that a trustee alone cannot issue a fiat against the debtor, especially if the cestui que trust has by his con-

duct equitably precluded himself from acquiescing in such proceeding. *Ex parte Gray*, 4 Dea. & Chit. 778. S. C. 2 M. & A. 283.

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Specific performance of sale under Lord *Loughborough's* Order decreed by this Court, although the following objections were urged: viz. 1st. That particulars of sale did not state that sale took place under order of Court; it appearing that purchaser must have known the fact that it was so. 2d. That a third mortgagee of equity of redemption, and an assignee on prior

insolvency of bankrupt, were not parties. 3d. Though the petitioning creditor's debt on which this fiat was founded was contained in the schedule in prior insolvency; especially as the purchaser was presumed to have known of all the objections to the title, and was held to have waived them by granting a lease of the premises purchased by him before the title to him was completed. *Quære*, whether this Court has jurisdiction to direct specific performance of contract of purchase of bankrupt's property, where the purchaser did not know, and had no means of knowing, that the sale took place under order of this Court or of Commissioners? *Ex parte Sidebotham*, 4 Dea. & Chit. 693; S. C. 2 M. & A. 146.

POWER OF ATTORNEY.

Special order as to the allowance of a bankrupt's certificate, where the signature of one of the creditors had been affixed to it under a power of attorney, and there was no affidavit of the execution of the power of attorney. *Ex parte* and *re Dunstan*, 1834. 4 Dea. & Chit. 30; S. C. 1 M. & A. 619.

Seemle, that a power of attorney to transact any business in the Courts of Law, authorizes the attorney to apply for a supersedeas. *Ex parte* and *re Crouther*, 1834. 4 Dea. & Chit. 31.

POLICY OF INSURANCE.

On a deposit of a policy of as-

surance, by way of equitable mortgage, the onus does not lie on the mortgagee, to show that notice of the deposit was given to the office before the act of bankruptcy, but with the assignees, to show that it was not. *Ex parte* and *re Stevens*, 1834. 4 Dea. & Chit. 117.

A party to whom the bankrupt had assigned a policy of assurance, sends an agent to the office for the purpose of paying the annual premium, who, in course of conversation with one of the clerks in the office, tells him of the policy having been so assigned:—Held, that this was not sufficient notice to the insurance office. *Ex parte Carbis*, *re Croggon*, 1834. 4 Dea. & Chit. 354; S. C. 1 M. & A. 693, n.

The bankrupt being one of the directors of a life assurance office, deposits a policy of that office with his bankers, as a collateral security for advances, one of the bankers being also one of the auditors of the assurance office:—Held, that this was sufficient notice to the office of the transfer of the bankrupt's interest in the policy, to prevent the claim of reputed ownership. *Ex parte Walthman*, *re Raikes*, 1835. 4 Dea. & Chit. 412; S. C. 2 M. & A. 364.

PRACTICE IN COURT.

No application can be made in the matter of a petition, before an office copy is taken of the affidavit filed in support of it. *Anon.* 1834.

4 Dea. & Chit. 141 ; *S. C. nom. Ex parte and re Matthews*, 2 M. & A. 73.

Where an assignee applies to have a solicitor's bill taxed for business before the choice of assignees, which is not included in the bill taxed by the Commissioners, the petition should state the nature of the business, and when it was done ; and the proceedings should also be in Court. *Ex parte Cass, re Rivers*, 1835. 4 Dea. & Chit. 273 ; *S. C.* 2 M. & A. 170. See this case on a subsequent occasion, *id.*

Upon a bankrupt's petition to supersede, depositions of trading and act of bankruptcy read in Court, so as to give him an opportunity of answering them. *Ex parte and re Lavender*, 1834. 4 Dea. & Chit. 486.

Seemle, that a petitioner, who is also assignee, and is proposed to be examined as a witness by the respondents, is excepted from the general rule for excluding witnesses during *vivâ voce* examination. *Ex parte Dugard, re Aughtie*, 1835. 4 Dea. & Chit. 524.

PRINCIPAL AND AGENT.

A. and *B.* have separate banking establishments in Scotland, where it is the custom of the different bankers to exchange the notes they hold of each other at stated periods, *A.* and *B.* were accustomed to make such mutual exchanges accordingly. *B.* becomes bankrupt, when his agent,

who conducted the business in Scotland, had in his possession notes of *A.*'s bank to the amount of 230*l.*, while *A.* had notes of *B.* to the amount of 764*l.* *B.*'s agent refuses to exchange the notes for 230*l.*, claiming himself a lien on them ; and *B.*'s assignees allow them to retain these notes in satisfaction of such lien. Held, that *A.* was entitled to recover the value of the notes from the assignees of *B.* *Ex parte National Bank of Scotland, re Maberly*, 1834. 4 Dea. & Ch. 32 ; *S. C.* 1 M. & A. 644.

The bankrupt had two agents, one at Glasgow, the other at Edinburgh. *A.* pays to the Glasgow agent a sum in bank-notes, for the purpose of being remitted to London, which the Glasgow agent transmits for that purpose in a parcel to the Edinburgh agent, from whom the notes are stolen by his clerk the day after the parcel is delivered, and a few days before a fiat is issued against the bankrupt :—Held, that *A.* had no claim to recover the value of the notes from the assignees. *Ex parte Watson, re Maberly*, 1834. 4 Dea. & Chit. 45 ; *S. C.* 1 M. & A. 685.

PRINCIPAL AND SURETY.

See also SURETY.

Defendant, after he had become bankrupt, was discharged out of custody on a *ca. sa.* upon executing a warrant of attorney with two sureties, the sureties consenting that the plaintiff, in order to lessen their liability, should

prove his debt under the commission. The plaintiff having proved his debt, but no dividend having been paid, the Court refused on summary application to exonerate the sureties. *Duncan v. Sutton*, 1 Bing. N. C. 431; S. C. 1 Scott, 338.

W. shipped at Leghorn twenty-three casks of oil, on account and by the order of *L.* at Liverpool, and transmitted to him a bill of lading. Before the arrival of the oil, *L.* indorsed the bill of lading, and deposited it with *H.*, who advanced money on it, having previously advanced money on other goods (the property of *L.*) deposited with him. On the arrival of the oil, *L.* having previously become bankrupt, and *W.* not having been paid for it, *W.*'s agents claimed it of the master of the ship; but the latter delivered it to *H.*, who afterwards sold the goods of *L.* as well as the oil of *W.* The net proceeds of the goods belonging to *L.* were sufficient to satisfy the debt due from *L.* to *H.* *H.* paid himself his debt, and deposited the net proceeds of *W.*'s oil with a third person, to abide the event of the award of an arbitrator, to whom all disputes between *W.* and the assignees of *L.* were referred. The arbitrator having stated the above facts on his award for the opinion of this Court:—Held, that *W.*, the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of *L.*, because the property in and the right to the pos-

session was then vested in *H.*, the indorsee of the bill of lading, for value; and further, that *W.* had not, by reason of such claim, any legal right to the possession of the goods after *H.*'s lien was satisfied: but that in a Court of Equity such transfer to *H.* would be treated as a pledge or mortgage only, and therefore *W.*, by his attempted stoppage in transitu, acquired a right to the goods in equity, subject to *H.*'s lien against the assignees of *L.*:—Held, secondly, that *W.*, by means of his goods, had become surety to *H.* for *L.*'s debt, and had a clear equity to oblige *H.* to pay his debt out of *L.*'s own goods deposited with him in ease of such surety; and all the goods both of *W.* and *L.* having been sold, *W.* might insist on the proceeds of *L.*'s goods being appropriated to payment of the debt: and, therefore, that *W.* was entitled to have all the proceeds of the oil paid over to him. *Re the Arbitration between Westzinthus and Assignees of Lapage and Co.: and between Rogers and Co. and the same Assignees*, 5 Barn. & Adol. 817.

PRIVATE ARRANGEMENT.

The Court will not make any order, on the application of the assignees, as to the management for the sale of the bankrupt's property; they must act on their own responsibility. *Ex parte Belcher, re Maberly*, 1834. 4 Dea. & Chit. 1; S. C. 1 M. & A. 478.

An order made by the Court,

sanctioning a pecuniary arrangement effected by the assignees. *Ex parte Prater, re Harley*, 1835. 4 Dea. & Chit. 214; S. C. 2 M. & A. 364.

A reference ordered to the Commissioner to inquire whether an arrangement, in regard to a portion of the bankrupt's property, which was approved of at a meeting of the creditors, would be beneficial to the estate. *Ex parte Kirby, re Pottinger*, 1835. 4 Dea. & Chit. 400; S. C. 2 M. & A. 142.

The Court will order a reference to inquire if it is proper to carry on the bankrupt's business, although some of the creditors dissent, but they will have liberty to prosecute the order. *Ex parte Mendel*, 4 Dea. & Chit. 725.

Reference to Registrar to see if arrangement out of Court by assignees was proper. *In re Hyslop*, 4 Dea. & Chit. 809; S. C. 2 M. & A. 289.

PRIVILEGE.

A bankrupt who has obtained his certificate, loses his privilege as to costs. *Ex parte and re Lomas*, 1834; 4 Dea. & Chit. 258; S. C. 1 M. & A. 525.

PROCEDENDO.

Although, upon a fiat being superseded, the Lord Chancellor has issued his confirmatory order, the Court of Review, upon a proper case on re-hearing, can in effect order a procedendo, by means of its intimation to the Lord Chancellor. *Ex*

parte and re Lavender, 1835. 4 Dea. & Chit. 496.

PROCEEDINGS.

See PRODUCTION OF PROCEEDINGS.

PRODUCTION OF DEEDS.

A petitioner, claiming a portion of the bankrupt's property, has no right to call for the production of a case stated by the assignees for counsel's opinion, for the purpose of showing that the bankrupt has prevaricated in his statements. *Ex parte Collier, re Collier*, 1834. 4 Dea. & Ch. 364.

PRODUCTION OF PROCEEDINGS.

A notice to produce the proceedings must be served on the assignees, not on the bankrupt. *Ex parte and re Daly*, 1834. 4 Dea. & Chit. 364.

PROOF GENERALLY.

See also DOUBLE PROOF—AFFIDAVIT OF PROOF.

Where a creditor applies to prove a debt, and claims a right to property in his possession, to which the Commissioners think he has no lien, the Commissioners should admit the proof, and leave the question of lien to be controlled merely by retention of the dividend. *Ex parte Dobson, re Thompson*, 1834. 4 Dea. & Chit. 69; S. C. 1 M. & A. 666.

Proof cannot be made by the joint estate against the separate estate, except in the case of a fraudulent

lent abstraction from joint funds by one of the partners; and not then, if there had been any waiver of the tortious act by the other partner, so as to reduce it to a matter of contract. *Ex parte Turner, re Mackenzie*, 1833. 4 Dea. & Chit. 169; S. C. 1 M. & A. 54.

G. & Co., to secure a permanent loan from their bankers, *V. & Co.*, to the amount of 20,000*l.*, agree to deposit with them their joint note for that amount; and, as collateral security, 10,000*l.* in bills not to be moved, and 10,000*l.* in bills to be with *G. & Co.* during the day, and also to leave a standing balance on the account every night of 4000*l.* In pursuance of this agreement, *G. & Co.* every evening delivered to *V. & Co.* bills of various amounts, but not less than 10,000*l.* on any occasion, unless their cash balance exceeded 4000*l.*; and every morning they received these bills back again from *V. & Co.*, which were either returned, or others of equal amount substituted, every evening. On the last day of dealing between the parties, *G. & Co.* informed *V. & Co.* that as they had drawn out the cash balance which they ought to have left in their hands, they had given additional security to *V. & Co.* by lodging bills with them to a larger amount. The amount of the sum so overdrawn was, in fact, 3000*l.*, and the amount of the bills then deposited was 22,666*l.*, including a note of hand of *B. & Co.* for 10,000*l.*, for

which *B. & Co.* had only received a partial consideration from *G. & Co.*; but *V. & Co.* had no notice of such want of consideration attaching to this note. At the closing of the business between *G. & Co.* and *V. & Co.*, a balance was due to *V. & Co.* of 35,386*l.*, for which they held the deposit of the bills and note to the amount of 22,666*l.*, besides the note of *G. & Co.* for 20,000*l.* *G. & Co.* afterwards stopped payment, when *V. & Co.* gave them a letter of licence, which was however subsequently recalled. *B. & Co.* became bankrupt:—Held, that *V. & Co.* were entitled to prove the full amount of the note for 10,000*l.* against *B. & Co.*'s estate; but that as the specified purpose of the deposit of the bills by *G. & Co.* with *V. & Co.* was not to secure any general balance, but merely the two loans of 20,000*l.* and 3000*l.*; the bills deposited were to be considered only as collateral security for those two sums, and not for the amount of the whole debt due to *V. & Co.*; that the proceeds of the other bills and of *G. & Co.*'s joint note must therefore be deducted from the 23,000*l.*; and that *V. & Co.* were entitled to receive dividends on their proof against *B. & Co.*'s estate, until they should have received full payment of the unsatisfied balance of this latter sum. *Ex parte Vere, re Bentley*, 1835. 4 Dea. & Chit. 295; S. C. 2 M. & A. 123.

Where the holder of bills, which

were deposited with him by the bankrupts as a collateral security for a debt, proved the amount of the balance due, excepting the bills as a security, and some of the bills were afterwards paid in full:—Held, that the amount of the bills so paid must be deducted from the proof, and the dividends calculated only upon the residue of the debt. *Ex parte Brunskill, re Bentley*, 1835. 4 Dea. & Chit. 442; S. C. 2 M. & A. 220.

An executor may prove against a bankrupt co-executor, without an order for that purpose. *Ex parte Courtney, re Davis*, 1835. 4 Dea. & Chit. 456; S. C. 2 M. & A. 227.

A former partner, there being partnership debts unpaid, cannot petition to prove the balance of accounts: *a fortiori* not to stay certificate. *Ex parte Robinson, re Case*, 1834. 4 Dea. & Chit. 499.

Annuity given by father on daughter's marriage, by a letter to the intended husband in these words, viz. "I promise you, until it is convenient to me to do something better for you, to allow to my daughter 100*l.* a-year, which you can have as you may require:"—Held, to be an annuity during the joint lives of the father and daughter; and though incapable of valuation, and though no other evidence of the genuineness of the letter, held to be provable. Sir *J. Cross, dissent.*, upon the ground that the facts required further investigation. *Ex parte Annandale, re Curtis*, 1834. 4 Dea. & Chit. 511.

Under the 6 *Geo.* 4. c. 16. s. 48. it is not requisite to prove a hiring for a year certain, but it must be something more than a mere hiring by the week. *Ex parte Skinner, Mont. & Bli.* 417, corrected. *Ex parte and re Collier*, 1834. 4 Dea. & Chit. 520.

Creditor having agreed to accept a composition for his debt, takes bills for the amount of the composition, and also has a bond assigned to him as part security for the composition. The composition deed contained a clause, that in default in payment of instalments, the composition should fall to the ground. Default is made, and subsequently a fiat issues:—Held, that creditor might prove balance of original debt remaining due, and also retain the bond. *Ex parte Reay, re Champion*, 1834. 4 Dea. & Chit. 525; S. C. 2 M. & A. 33.

A partnership of *A.*, *B.*, & *C.* is dissolved, *A.* & *B.* agreeing to pay all the partnership debts. *D.*, a creditor of the old firm, ignorant of the terms of the dissolution, applies for payment; and *A.* & *B.* by letter beg time, and ultimately *D.* draws a bill on *A.*, *B.*, & *C.*, which *A.* & *B.* accept in the name of *A.*, *B.*, & *C.*, but without *C.*'s authority. *A.* & *B.* also, by letter signed by them alone, promise payment of the bill. *A.* & *B.* became bankrupts; *C.* also became bankrupt:—Held, under the circumstances, that *D.* might prove the amount of the bill against *A.* &

B.'s estate. *Ex parte Liddiard, re Coward*, 1835. 4 Dea. & Chit. 603.

On an agreement for a composition, *A.* the creditor received, as a further security, the assignment of several debts due to *B.* the debtor. Default was made in payment of the instalments of the composition, and *B.* became bankrupt. Held, that *A.* might prove the amount of his original debt, but that he could not also retain the benefit of the assignment of the debts. The value of them was therefore directed to be ascertained, and liberty given for *A.* to prove for the difference, if he elected to retain them. *Ex parte Ellis*, 4 Dea. & Chit. 736; *S. C.* 2 M. & A. 370.

A. and *B.* give a joint promissory note, upon which money is lent by *C.* to them, and by them to *D.* *B.* becomes bankrupt, and *A.* is obliged after the bankruptcy, to pay the note. Held, that he is not a surety for *B.*, but that *A.* and *B.* are principal debtors or co-sureties, and therefore that *A.* could not prove for a moiety of the note against *B.*'s estate. *Ex parte Porter*, 4 Dea. & Chit. 774; *S. C.* 2 M. & A. 281.

On the formation of a partnership between *A.* & *B.*, *A.* lends to *B.*, *B.*'s proportion of the capital, and *A.* is to receive it again, and interest thereon, out of *B.*'s share of the profits. *B.* assigns property to *C.* in trust to secure to *A.* the money lent by him, and covenants to pay *C.* the amount. After an act of bankruptcy by *B.*, known to *A.*, *A.* files a bill for a dissolution and account of part-

nership and for payment of the debt:—Held, that *A.* & *C.* could not, after such election, sue out a fiat against *B.* founded on that debt, *A.* having elected his remedy and treated the debt as mixed up with the partnership accounts. *Ex parte Gray*, 4 Dea. & Chit. 778; *S. C.* 2 M. & A. 283.

In 1780 *A.* and *B.* were partners as army agents, having been in the habit of receiving money from the government for the pay of certain regiments. In that year *A.* retires, and *B.* and *C.* carry on the business as before, but without coming to any account with the Crown, and without any account whatever being taken of the liabilities of the firm of *A.* and *B.* at the time of *A.*'s retiring. In 1783, *B.* & *C.* are required by the government to render the account of monies issued for the several regiments during the period of the existence of the firm of *A.* and *B.* and of *B.* and *C.*, which they do without any break appearing in them at 1780, when *A.* retired. But the accounts rendered do not state any debtor and creditor account as between the respective firms and the Crown, but show simply the sums issued in respect of each regiment, and how they have been applied. On the formation of the firm of *B.* and *C.*, the old ledgers are used; there was no agreement to take to the liabilities of *A.* and *B.*, and every thing is carried on in the same manner as before till 1783, when the 23 Geo. 3. c. 30. was passed, which di-

rects that an estimate is to be thenceforth prepared of the amount which will be required for the purposes of the army; that the amount is to be paid from time to time into the bank; that the paymaster of the forces is to communicate to the Secretary at War the sums that will be required for the purposes of the different regiments; that the agents of the different regiments are to communicate to the Secretary at War the sums that will be required for the different regiments, and an issue is then made to the agent for the particular purposes of those regiments, and annual accounts were required to be rendered by the several agents. Upon this footing matters are carried on till 1804, when *B.* and *C.* became bankrupts, and a balance of 150,000*l.* is found due to the Crown; and in 1820, and not before, it is found that 91,000*l.*, part of the 150,000*l.*, was due at the time of the retirement of *A.* *Seemle*, under these circumstances, that *B.* and *C.* could not be presumed to have adopted the debt of *A.* and *B.*, and that the government could not be presumed to have assented thereto had such adoption existed; and, consequently, that the government had no right to prove the entire sum of 150,000*l.* against *B.* and *C.*'s estate. (*Cross, J. dissent.*) But it also appearing that the assignees had, by proceedings in the Court of Session in Scotland, treated the 91,000*l.* as due from their estate, and the government having, on the

other hand, sued the representatives of *A.* in Scotland (subsequently to the discovery of the balance being due) so as to charge *A.* alone as the debtor, a claim was permitted to be entered till the result of the Crown's proceedings, which were still pending, against the representatives of *A.* was ascertained. *Ex parte Sandham*, 4 Dea. & Chit. 818.

If defective affidavit be produced, Commissioner should not reject, but only adjourn proof. *Ex parte Maberly, re Young*, 2 M. & A. 23.

Affidavit to support deposition of proof on bill, should state consideration. *Ex parte Maberly, re Young*, 2 M. & A. 23.

The instalments of an annuity for the payment of which a bankrupt is surety only, and which he covenants to pay in case of the default of the grantor, are not, where they become due after his bankruptcy, proveable under a fiat against the surety. *Thompson v. Thompson*, 2 Bing. N. C. 168.

The Master found, that two executors had, by signing joint cheques, enabled each other to receive sums belonging to the estate of their testatrix, when they were both largely indebted to that estate; and that the sums so received by them were debts proveable under their respective commissions, both executors having become bankrupt:—Held, that interest at 5*l.* per cent., as the consequence of the *deceit*, was to be added

to the principal sums found to be proveable against the bankrupt estates of the executors. *Bick v. Motly*, 2 Mylne & Keen, 312.

Effect of.

The mere circumstance of a creditor coming in under the commission to prove or claim a debt, only gives the Court jurisdiction as to the proof or claim, and not over any property in his possession, of which he claims the legal ownership. *Ex parte Dobson, re Thompson*, 1834. 4 Dea. & Chit. 69; S. C. 1 M. & A. 666.

Defendant, after he had become bankrupt, was discharged out of custody on a *ca. sa.* upon executing a warrant of attorney with two sureties, the sureties consenting that the plaintiff, in order to lessen their liability, should prove his debt under the commission. The plaintiff having proved his debt, but no dividend having been paid, the Court refused, on summary application, to exonerate the sureties. *Duncan v. Sutton*, 1 Bing. N. C. 431; S. C. 1 Scott, 338.

Amount of.

Where goods in which the bankrupts were jointly interested with A. B., were pledged with a creditor to secure the payment of an acceptance of the bankrupts, and part of the proceeds were received by the creditor before he applied to prove:—Held, that he must deduct the amount so received before he could

prove on the acceptance. *Aliter*, if the goods had belonged to A. B. alone. *Ex parte Prescott, re Thompson*, 1834. 4 Dea. & Chit. 23.

PROOF EXPUNGING.

See also PETITION TO EXPUNGE.

On an application by two creditors to the Commissioners to expunge a proof, under the 6 G. 4. c. 16. s. 60., the Commissioners have a discretionary power to adjudge to the creditor whose proof is sought to be expunged, such costs as he may think reasonable, including the costs of the meetings, as well as those of the creditor. And though the Commissioners may have allowed rather too much to the creditor, this will not make the order bad for the whole allowance, but the objecting parties may have the costs taxed. *Ex parte Kirkaldy, re Holt*, 1834. 4 Dea. & Chit. 52; S. C. 1 M. & A. 642.

One of a double proof made more than six years back, ordered to be expunged, according to *Ex parte Moulton*. But dividends received on the expunged proof more than six years back, cannot be refunded, even though there was no chance of recouping the injured estate out of future dividends from the remaining proof. *Ex parte Soper, re Salter*, 1835. 4 Dea. & Chit. 569.

Rejection of.

Commissioner having improperly rejected proof, because claim was

merged in felony, the petitioner was allowed costs out of estate. *Ex parte Birks*, 2 M. & A. 208. n. (a).

PROTECTED CONTRACTS AND PAYMENTS.

A transfer made by a debtor under apprehension of arrest, is not fraudulent and void as *voluntary*, under (the Insolvent Debtors' Act) 7 Geo. 4. c. 57. s. 32. *Corbould v. Broadhurst*, 1 Moody & Rob. 189.

In trover by assignees for timber, an arbitrator to whom the cause was referred found that the bankrupt, before his bankruptcy, had on behalf of an unnamed principal (the defendant) taken in exchange a quantity of timber to be delivered free on board; and that he had at the same time bought other timber of the same party on his own account; that the timber was delivered to the bankrupt, and lay, till after the bankruptcy, on a common, mixed with other timber of the bankrupt, and in his actual possession: that the defendant, after the bankruptcy, but more than two months before the commission issued, wrote to the vendor, stating himself to be the principal, adopting the contract as to the goods taken in exchange (but no other), and directing that the bankrupt should not be suffered to take them; and that the vendor accepted him as purchaser accordingly. The arbitrator also found, that before the commencement of two months the

defendant had required the bankrupt to deliver the timber belonging to him (the defendant), and that the bankrupt had proposed to make up a deficiency in the quantity by delivering some of his own timber: that no contract of sale was made as to the latter, nor did any thing further pass respecting the timber till within two months before the commission, when the bankrupt made a formal delivery to the defendant of part of the sold and part of the exchanged timber, lying on the common as above-mentioned; and that the whole of the timber belonging to the defendant was in the order, possession, and disposition of the bankrupt, with the consent of the true owner, till after the bankruptcy:—Held, (assuming that the Court could review the arbitrator's finding as to the above facts), 1. That he was warranted in finding a delivery of the timber to the bankrupt, though it was not shipped. 2. That the timber remained in the bankrupt's apparent possession, with the owner's consent, up to the time of the above delivery. 3. That the delivery to the defendant, of the timber belonging to the bankrupt, was not referable to any contract protected by sect. 81. of the Bankrupt Act. *Shaw v. Harvey*, 1 Adol. & Ellis, 920. .

S. contracted with the defendants to execute an extensive building operation for them, in consideration of a certain sum, and of being allowed

to use certain materials. The defendants' engineer was empowered to reject any materials or work not in his opinion conformable to the plans and specifications, and to provide other materials, and employ competent persons to perform the work, if *S.* failed to do so, as well as to deduct the amount from the sum payable to him under the contract. The defendants were at liberty to diminish or add to the works, paying *S.* at the contract prices accordingly, or deducting from them, if necessary. *S.* placed on the defendants' premises steam-engines, rail-roads, materials, implements, and other articles of various kinds, necessary to carry on the works. The defendants' engineer visited the premises daily and rejected such of the materials brought thither by *S.* as he thought unfit for use. During the progress of the works advances were made by the defendants to *S.* on his application; he agreeing that all the engines, materials, &c., brought or to be brought on the defendants' premises for use in constructing the works, should be a security for such advances. Those advances always exceeded the value of the property so on the premises. *S.* became bankrupt before the works were completed, upon which the defendants erased his marks on the engines, materials, implements, &c. then on their premises. In trover, brought by the assignees of *S.* against the defendants, to recover such engines, materials &c.:—Held, first,

that the arbitrator had no power to award that the defendants were entitled to prove against the estate of *S.* for the sum advanced to him by them beyond the value of the work done and materials furnished by him, and of the engines, &c. agreed to stand as security. Secondly, That the plaintiffs were not entitled to recover for extra work done by the bankrupt. Thirdly, That as there had been such a possession of the engines, materials, &c. by the defendants as would support the lien, which it was the effect of the bankrupt's agreement to confer on them, the plaintiffs were only entitled to recover for such materials, &c. as were brought on the defendants' premises after the act of bankruptcy. Fourthly, That payments to the bankrupt by the defendants, after the latter portions of materials were brought on the premises, could not be considered as payments for those particular goods in the course of business, but as general advances only, so that they could not be retained by the defendants under 6 G. 4. c. 16. s. 82. *Crowfoot v. London Dock Company*, 4 Tyr. 967.

After *L.* a trader had committed a secret act of bankruptcy, *M. & Co.* his creditors, knowing him to be embarrassed, pressed him for payment. *L.* said he had no money, but that if they could get a customer for his goods, they should be paid. *M. & Co.* accordingly procured the defendant *A.* a creditor of their own, to buy goods of *L.* No money passed

from *A.* to *L.* or to *M. & Co.*, but *A.* gave *M. & Co.* credit on account. This transaction was communicated to *L.*, and a receipt was given him by *M. & Co.*, signed by them, specifying it to be "by payment of defendant *A.* agreeably to his order, balancing their account with him." A fiat having issued against *L.*, his assignees sued *A.* in assumpsit for the price of the goods sold to him:—Held, first, that if the appropriation of the price to *M. & Co.* was parcel of the contract between *A.* and *L.*, and by its terms irrevocable, the action should have been trover; for by waiving the tort and affirming the contract, the assignees adopted it in all its parts, though a further question would arise whether the payment relied on by *A.* the defendant, as made in pursuance of the contract, was a payment protected by 6 *G.* 4. c. 16. s. 82. Secondly, that if the payment by *A.*, the defendant, to *M. & Co.*, was not stipulated for in the original contract, but was merely directed afterwards by *L.*, and had not been acted on, that direction was revocable by him before his bankruptcy, or by his assignees after that event, and the plaintiffs were entitled to recover. *Bradbury v. Anderton*, 5 *Tyr.* 152; *S. C.* 1 *Crom. M. & R.* 486.

PROVISIONAL ASSIGNMENT.

In 1825 an assignment from provisional assignee to assignees, was prepared, but through neglect of so-

licitor never executed. The provisional assignment ordered to be vacated, and a new assignment executed by the Commissioners. It seems the 1 & 2 *Will.* 4. c. 56. s. 25. do not apply in such a case. The solicitor having been paid for the assignment, ordered to refund. *Ex parte Bennett, re Stephens*, 2 *M. & A.* 306.

READING DEPOSITIONS OF TRADING, &c.

Upon bankrupt's petition to supersede, depositions of trading and act of bankruptcy read in Court, so as to give him an opportunity of answering them. *Ex parte and re Lavender*, 1834. 4 *Dea. & Chit.* 486.

REDUCTION OF RENT.

An *ex parte* order was obtained by the tenant of the assignees to refer it to the Commissioner to ascertain if a reduction of his rent would be beneficial to the bankrupt's estate. The Commissioner certified that it would, and that another person had tendered a higher rent than that to which he proposed to reduce the original rent. An application was made to confirm the certificate. A petition was presented by creditors, one of whom had offered the higher rent, to discharge the order of reference and the Commissioner's certificate. But the Court refused to interfere, leaving the petitioners to their remedy against the assignees, if they were aggrieved, as their rights were not

bound by the proceeding, and as they were no parties to the order. *Sir J. Cross, dissent. Ex parte De Begnis, re Chambers*, 1834. 4 Dea. & Chit. 225; S. C. 1 M. & A. 277.

REFERENCE.

Affidavits referred for scandal on motion of course. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Ch. 217.

A cross-petition by the bankrupt for allowance of the certificate, will not be advanced on motion of course, pending the reference for scandal of affidavits filed in answer to the petition to stay the certificate, on the ground that the latter petition was improperly served. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Ch. 217.

Contrary to *Ex parte Pelham* (Mont. 211.), held, that any party may apply to refer affidavits for scandal, and that the application need not be by the party scandalized. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Ch. 218.

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discharge the order of reference and the Commissioner's certificate. But the Court refused to interfere, leaving the petitioners to their remedy against the assignees, if they were aggrieved, as their rights were not bound by the proceeding, and as they were no parties to the order. *Sir J. Cross, dissent. Ex parte De Begnis, re Chambers*, 1834. 4 Dea. & Chit. 225; S. C. 1 M. & A. 277.

Reference to the Commissioner to allow, on the taxation of the petitioning creditor's bill of costs, certain expenses incurred before adjudication by parties appointed by the creditors to act for the benefit of the estate. *Ex parte Evans, re Bentley*, 1835. 4 Dea. & Chit. 392.

Although the petitioning creditor is not entitled to an order on the assignees to pay the amount of his costs, before they have received money under the fiat, he is nevertheless entitled to an inquiry, whether any assets have been received by the assignees. *Ex parte Abram, re Dunnas*, 1835. 4 Dea. & Ch. 401.

A new trustee appointed, without a reference to the Registrar, on an affidavit of the fitness of the proposed trustee. *Ex parte Beveridge, re Hutton*, 1835. 4 Dea. & Ch. 455.

The Court will order a reference to inquire if it is proper to carry on the bankrupt's business, although some of the creditors dissent, but they will have liberty to prosecute the order. *Ex parte Mendel*, 4 Dea. & Ch. 725.

Reference to Registrar to see if

arrangement out of Court by assignees was proper. *In re Hyslop*, 4 Dea. & Ch. 809; S. C. 2 M. & A. 289.

Where trustee becomes bankrupt, the general rule is, that the Court will not appoint a new one, under 6 Geo. 4. c. 16. s. 79., without a reference, unless all the trustees are before the Court. The smallness of the estate may form an exception. *Ex parte Whisk, re Sandys*, 2 M. & A. 214.

If trustee becomes bankrupt, Court will appoint new one without a reference, if there be an affidavit of solvency, fitness, &c. *Ex parte Walton, re Toulminson, id.* 242.

REFUNDING.

In 1825 an assignment from provisional assignee to assignees was prepared, but through neglect of solicitor never executed. The provisional assignment ordered to be vacated, and a new assignment executed by the Commissioners. It seems the 1 & 2 Will. 4. c. 56. s. 25. do not apply in such a case. The solicitor having been paid for the assignment, ordered to refund. *Ex parte Bennett, re Stephens*, 2 M. & A. 306.

REGISTRAR'S CERTIFICATE.

See CERTIFICATE OF REGISTRAR.

REGISTRY.

An order of the Lord Chancellor made in a suit brought by the assignees, was, on their application, ordered to be registered in the Court of Bankruptcy. *Ex parte Williams, re Wienholt*, 1834. 4 Dea. & Ch. 110; S. C. 1 M. & A. 689.

REHEARING.

See also PETITION TO REHEAR.

Where a party wishes an essential alteration to be made in the judgment of the Court, as pronounced on a former hearing, he must not apply to amend the minutes of a former order, but must petition for a rehearing. *Ex parte Soper, re Salter*, 1835. 4 Dea. & Chit. 275; S. C. 2 M. & A. 58.

The Court will in general rehear petitions and rescind former orders upon fresh evidence tendered, but not where such orders are made upon petitions to stay certificate, or to supersede or annul fiats. *Ex parte and re Lavender*, 1835. 4 Dea. & Ch. 497.

REJECTION OF LEASE.

See LEASE, REJECTION OF.

REJECTION OF PROOF.

See PROOF, REJECTION OF.

RENT.

See REDUCTION OF RENT.

RENEWED FIAT.

A creditor whose debt arises on a lost bill of exchange, issues a fiat, which he cannot support in consequence of his inability to prove the

loss of the bill, so as to let in satisfactory evidence of its contents; upon which the assignees obtain an order, that a renewed fiat may issue on the debt of another creditor:—Held, that the petitioning creditor under the new fiat was not exonerated, under these circumstances, from making the payments of 10*l.* and 20*l.* to the Secretary of Bankrupts and the Accountant-General, under the provisions of the 45th and 46th sections of the Bankruptcy Court Act. *Ex parte Osborne, re Gunning*, 1835. 4 Dea. & Chit. 398; S. C. 2 M. & A. 140.

REPORT.

Motion to confirm report as to scandal in affidavits is a motion of course. *Ex parte Hetherington, re Glossop*, 1834. 4 Dea. & Chit. 223.

REPUDIATION.

Where, upon order of dividend, assignees forward to creditor a bill for the amount of his dividend, but creditor rejects it, because he claims more than is offered (namely, full payment, without allowing the assignees a set-off, which they claimed against him, and the amount of which, together with the sum tendered, made up the amount of dividend declared on creditor's proof,) and the proceeds of the bill are received by one assignee, and by him invested at interest:—The creditor was held, after twenty years and upwards, entitled to the fund, and all interest made by it. *Ex*

parte Holford, 4 Dea. & Ch. 798; S. C. 2 M. & A. 289.

REPUTED OWNERSHIP.

By the rules of an insurance company, no person, except a director, was permitted to hold more than two shares in his own name; but no rule prevented a person from being beneficially entitled to more than two shares, by holding them in the name of another party. The petitioner, who was already the holder of two shares, having purchased two other shares, caused them to be entered in the name of the bankrupt in the company's books, with the knowledge of one of the directors and the actuary. The bankrupt signed a declaration of trust, that he held the shares as trustee for the petitioner, but no notice of the trust was taken in the books of the company; and he continued to receive the dividends on the shares, accounting for them from time to time to the petitioner, up to the period of his bankruptcy, when the shares were still standing in his name. Held, that the shares did not pass to his assignees, as being in his order and disposition at the time of his bankruptcy. *Ex parte Watkins, re Kidder*, 1834. 4 Dea. & Ch. 87; S. C. 1 M. & A. 689.

On a deposit of a policy of assurance by way of equitable mortgage, the onus does not lie on the mortgagee, to show that notice of the deposit was given to the office before the act of bankruptcy, but with the

assignees, to show that it was not. *Ex parte* and *re Stephens*, 1834. 4 Dea. & Ch. 117.

A bankrupt deposits with the petitioner, by way of equitable mortgage, an assignment, which had been made to the bankrupt, of a reversionary interest under a will; no notice of the assignment having been given to the executors either by the bankrupt or by the petitioner:—Held, that the property was not within the order and disposition of the bankrupt as reputed owner. *Ex parte Newton, re Goren*, 1834. 4 Dea. & Ch. 138; S. C. 2 M. & A. 51.

A bankrupt being the owner as well as occupier of a freehold cotton mill, gave the petitioners an equitable mortgage on it, "together with the steam engines, and also all and singular other the moveable and fixed machinery and steam pipes then in, upon, about, and belonging to the said steam-mill and premises, or occupied or used therewith;" and the bankrupt continued in possession of the mill and fixtures up to the period of his bankruptcy:—Held, that all parts of the machinery and fixtures, which were so attached to the premises as to be legally affixed to the freehold, were not to be considered as goods and chattels within the 72nd section of the Bankrupt Act, and that the assignees had no right to them as against the equitable mortgagee. *Ex parte Wilson, re Butterworth*, 1835. 4 Dea. & Chit. 143; S. C. 2 M. & A. 61; S. P. *Ex parte Belcher, re*

Moberly, 4 Dea. & Ch. 703; S. C. 2 M. & A. 160.

By a clause in the deed of settlement of a banking company, it was stipulated that the company should have a lien on the share of such proprietors as were customers and indebted to the bank, and that no share should be transferred without the consent of the directors; and an abstract of these provisions was indorsed on the certificate of the share held by each proprietor. The bankrupt, at the time of his bankruptcy, was the owner of thirty of these shares, and had in his possession the certificates of ownership thus indorsed, being then largely indebted to the bank for advances:—Held, that these shares did not pass to his assignee under the clause of reputed ownership in the Bankrupt Act, so as to defeat the lien of the bank, which had been provided for in the deed. *Ex parte Plant, re Butterworth*, 1835. 4 Dea. & Ch. 160.

A party to whom the bankrupt had assigned a policy of assurance, sends an agent to the office for the purpose of paying the annual premium, who, in the course of conversation with one of the clerks in the office, tells him of the policy having been so assigned. Held, that this was not sufficient notice to the insurance office. *Ex parte Carbis, re Croggon*, 1834. 4 Dea. & Ch. 354; S. C. 1 M. & A. 693, n.

By the terms of a settlement made previous to the bankrupt's mar-

riage, all the property of his intended wife was vested in trustees for her separate use, and she was to have all the rights and privileges of a *feme sole*. This property consisted of a hotel and furniture at Brighton, the business of which was conducted entirely by the wife, the bankrupt never living at the hotel, nor in any way interfering in the management of it:—Held, that this property was not in the reputed ownership of the bankrupt. *Ex parte Massey, re Massey*, 1835. 4 Dea. & Chit. 405; S. C. 2 M. & A. 173.

The bankrupt being one of the directors of a life assurance office deposits a policy of that office with his bankers, as a collateral security for advances, one of the bankers being also one of the auditors of the assurance office. Held, that this was sufficient notice to the office of the transfer of the bankrupt's interest in the policy, to prevent the claim of reputed ownership. *Ex parte Waithman, re Raikes*, 1835. 4 Dea. & Ch. 412; S. C. 2 M. & A. 364.

The bankrupt shipped goods to *M. and F.* at New South Wales, and the petitioner accepted bills drawn by the bankrupt for the invoice price, upon the express agreement that the proceeds of the several consignments should be received by the petitioner, and be appropriated by him in discharge of such acceptances; and notice of this agreement was given to *M. and F.* Two bills which were remitted to England by *M. and F.* on

account of the proceeds of some of the shipments made by the bankrupt, came to the hands of the assignees:—Held, that the petitioner was entitled to the proceeds of these bills, as well as all the future proceeds that might come to the hands of the assignees, in respect of the shipments made by the bankrupt to *M. and F.* to be applied in discharge of the petitioner's acceptances. *Ex parte Flower, re Cormie*, 1835. 4 Dea. & Ch. 449; S. C. 2 M. & A. 224.

M. and A., partners, were consignees of a West India state, and in that character became creditors to the estate. By deed, long prior to the bankruptcy, the estate was conveyed to trustees, *M.* being one of them, on trust, to apply the proceeds to certain purposes, one of which was to pay off the debt due to *M. and A.* *M. and A.* assign their debt to *S. & Co.* *M. & A.* become bankrupt; but, prior thereto, they receive ten hogsheads of sugar, which remain in the docks, earmarked in their name, at the time of the bankruptcy. Shortly after the bankruptcy, seventy-four hogsheads arrive, consigned by the bill of lading to the bankrupts, which are received by the assignees, who also take the other ten hogsheads. Held, that the sugars came to the hands of *M. and A.* clothed with trusts to pay the proceeds to *M.* as trustee, and were not in the reputed ownership of *M. and A.* but must be applied to pay off the debt assigned to *S. & Co.*, and in discharge

of the other trusts of the deed; *M.* as trustee being affected with notice to *M.* and *A.* of the assignment of their debt. Held also, a case within the principle of *Ex parte Waring*, 9 Ves. 345. *Ex parte Smith, re Manning*, 1834. 4 Dea. & Ch. 579.

Where real property "with its appurtenances" (without other evidence of intention) was mortgaged by the owner of the fee, articles of furniture, as rolling maps, affixed before and after the mortgage to the freehold, although they might have been removable as between a landlord and tenant, and although he continued in possession up to the time of his bankruptcy, passed by the mortgage and were taken out of the order and disposition of the bankrupt owner. Whatever is affixed to freehold by the owner of the inheritance is to be considered as a fixture till severed by him; and whether so affixed before or after a mortgage, passes absolutely to the mortgagee. *Ex parte Belcher*, 4 Dea. & Chit. 703; *S. C.* 2 M. & A. 160.

Where the owner of shares in an insurance company transfers them by way of equitable mortgage, though he does not observe the rules of the company in regard to the mode of transfer, and though he continues to act as director without having any other shares than those assigned (the being a shareholder to a certain extent alone entitling him so to act,) yet if the transferee gives notice to the company of his mortgage, and the owner becomes bankrupt, they are

taken out of his order and disposition; especially where the company make entry of the notice in their books in such a manner as to evince their knowledge that such owner could not further dispose of the shares. Bare notice in such cases seems sufficient. *Ex parte Masterman*, 4 Dea. & Ch. 751; *S. C.* 2 M. & A. 209.

If mortgagee be himself the trustee to whom notice was requisite, the transaction itself is notice enough to prevent reputed ownership. *Ex parte Smart, re Holt*, 2 M. & A. 60.

Where shares of a company stand in the name of the bankrupt, who is on all occasions the only apparent owner and has possession of the certificates; but the shares belong to another in whose favour there is a secret declaration of trust, the shares are in the bankrupt's reputed ownership. That one of the directors and the actuary knew the shares not to be the bankrupt's, is not sufficient to prevent reputed ownership. *Ex parte Watkins, re Kidder*, 2 M. & A. 348; reversing *S. C.* 1 M. & A. 689; 4 Dea. & Ch. 87.

Plaintiff sold to *J.* trees lying on land occupied by *B.*, and *J.* was to have power of removing them when he pleased. The trees having been marked by the purchaser, the cubical contents of each ascertained, and some of them having been taken away:—Held, that the transfer of the whole was complete, and that upon *J.*'s bankruptcy the plaintiff could not enforce any lien on the trees, not-

withstanding they remained on the land of *B.*, and the sum total of the cubical contents had not been ascertained. *Tansley v. Turner*, 2 Bing. N. C. 151.

F., a merchant at Liverpool, used to consign goods to his agent at Bahia, in South America, for sale, and to draw bills upon the credit of, and against such consignments, in proportion to their amount, to be paid by the agent out of the proceeds. Some bills so drawn, and negotiated by the indorsements of a house in London with which *F.* corresponded, were refused acceptance by the agent. The London house thereupon requested *F.* to write to his agent at Bahia, with orders, "that in case he did not pay *F.*'s drafts, he should immediately hand over such property as he might have of *F.*'s, of an equivalent value to the bills not paid by him, to the agent of the London house at Bahia." *F.* replied, that he would write to his agent, agreeably to these injunctions, directing him to hand over to the agent of the London house, "property of *F.* in his hands, to cover the amount of bills that eventually might not be paid." Afterwards, and before the letter from *F.* to his agent reached Bahia, *F.* became bankrupt. *F.*'s agent subsequently handed over to the London house goods consigned to him as above mentioned, to an amount less than that of the bills unpaid:—Held, that there was no legal or equitable assignment of those goods to the London house before the bank-

ruptcy, and that on that event the property in them vested in the assignees. In an action of trover brought by the assignees for the goods, in which the above facts were proved, the defendants also offered in evidence the letter written by *F.* to his agent at Bahia (after promising the London house to write, as above stated), in which he ordered that party to hand over all the property which he held on *F.*'s account to the agents of the London house:—*Quære*, Whether the letter was admissible; but held, that if it were, the decision ought still to be the same. *Burn v. Carvalho*, 1 Adol. & Ellis, 883.

Goods were sold under an invoice which expressed that they remained at rent. The vendee consequently accepted a bill drawn by the vendor for the price, which was negotiated by the vendor. Whilst the bill was running, the vendee sold a part, which, by his direction, was delivered by the vendor to the sub-vendee, whom the vendor charged with warehouse rent for the past, which he paid. Subsequently the vendee became bankrupt, and the bill was dishonored:—Held, that the assignee of the bankrupt vendee could not, without paying the price, maintain trover against the vendor for the residue of the goods which had remained in his hands. *Miles v. Gordon*, 2 Crom. & M. 504.

A coal-merchant, at the time of his bankruptcy, had in his possession barges which bore his own name and

number, and were registered in his name under the Waterman's Act. These barges he had hired of defendant, it being the custom for coal-merchants to hire barges, and to paint on them the name of the hirer. Upon a question whether the barges passed to the coal-merchant's assignees under his bankruptcy:—Held, that it was properly left to the jury to find whether the custom to hire was generally notorious in the coal-trade; and that it was not necessary to direct them to inquire whether the custom was notorious to the world at large. *Watson v. Peache*, 1 Bing. N. C. 327; *S. C.* 1 Scott, 149.

S. contracted with the defendants to execute an extensive building operation for them, in consideration of a certain sum, and of being allowed to use certain materials. The defendants' engineer was empowered to reject any materials or work not in his opinion conformable to the plans and specifications, and to provide other materials, and employ competent persons to perform the work, if *S.* failed to do so, as well as to deduct the amount from the sum payable to him under the contract. The defendants were at liberty to diminish or add to the works, paying *S.* at the contract prices accordingly, or deducting from them, if necessary. *S.* placed on the defendants' premises steam-engines, rail-roads, materials, implements, and other articles of various kinds, necessary to carry on the works. The defendants' engineer

visited the premises daily and rejected such of the materials brought thither by *S.* as he thought unfit for use. During the progress of the works advances were made by the defendants to *S.* on his application; he agreeing that all the engines, materials, &c., brought or to be brought on the defendants' premises for use in constructing the works, should be a security for such advances. Those advances always exceeded the value of the property so on the premises. *S.* became bankrupt before the works were completed, upon which the defendants erased his marks on the engines, materials, implements, &c. then on their premises. In trover, brought by the assignees of *S.* against the defendants, to recover such engines, materials &c.:—Held, first, that the arbitrator had no power to award that the defendants were entitled to prove against the estate of *S.* for the sum advanced to him by them beyond the value of the work done and materials furnished by him, and of the engines, &c. agreed to stand as security. Secondly, That the plaintiffs were not entitled to recover for extra work done by the bankrupt. Thirdly, That as there had been such a possession of the engines, materials, &c. by the defendants as would support the lien, which it was the effect of the bankrupt's agreement to confer on them, the plaintiffs were only entitled to recover for such materials, &c. as were brought on the defendants' premises after the act of bank-

ruptcy. Fourthly, That payments to the bankrupt by the defendants, after the latter portions of materials were brought on the premises, could not be considered as payments for those particular goods in the course of business, but as general advances only, so that they could not be retained by the defendants under 6 G. 4. c. 16. s. 82. *Crowfoot v. London Dock Company*, 4 Tyr. 967.

In trover by assignees for timber, an arbitrator to whom the cause was referred found that the bankrupt, before his bankruptcy, had on behalf of an unnamed principal (the defendant) taken in exchange a quantity of timber to be delivered free on board; and that he had at the same time bought other timber of the same party on his own account; that the timber was delivered to the bankrupt, and lay, till after the bankruptcy, on a common, mixed with other timber of the bankrupt, and in his actual possession: that the defendant, after the bankruptcy, but more than two months before the commission issued, wrote to the vendor, stating himself to be the principal, adopting the contract as to the goods taken in exchange (but no others), and directing that the bankrupt should not be suffered to take them; and that the vendor accepted him as purchaser accordingly. The arbitrator also found, that before the commencement of two months the defendant had required the bankrupt to deliver the timber belonging to

him (the defendant), and that the bankrupt had proposed to make up a deficiency in the quantity by delivering some of his own timber: that no contract of sale was made as to the latter, nor did any thing further pass respecting the timber till within two months before the commission, when the bankrupt made a formal delivery to the defendant of part of the sold and part of the exchanged timber, lying on the common as above-mentioned; and that the whole of the timber belonging to the defendant was in the order, possession, and disposition of the bankrupt, with the consent of the true owner, till after the bankruptcy:—Held, (assuming that the Court could review the arbitrator's finding as to the above facts), 1. That he was warranted in finding a delivery of the timber to the bankrupt, though it was not shipped. 2. That the timber remained in the bankrupt's apparent possession, with the owner's consent, up to the time of the above delivery. 3. That the delivery to the defendant, of the timber belonging to the bankrupt, was not referable to any contract protected by sect. 81. of the Bankrupt Act. *Shaw v. Harvey*, 1 Adol. & Ellis, 920.

RESCINDING ORDER.

Although, upon a fiat being superseded the Lord Chancellor has issued his confirmatory order, the Court of Review, upon a proper case on re-hearing, can in effect order a

procedendo, by means of its intimation to the Lord Chancellor. *Ex parte and re Lavender*, 1835. 4 Dea. & Chit. 496.

RETAINING SECURITIES.

Creditor having agreed to accept a composition for his debt, takes bills for the amount of the composition, and also has a bond assigned to him as part security for the composition. The composition deed contained a clause that on default in payment of instalments, the composition should fall to the ground. Default is made, and subsequently a fiat issues:—Held, that creditor might prove balance of original debt remaining due, and also retaining bond. *Ex parte Reay, re Champion*, 1834. 4 Dea. & Chit. 525; S. C. 2 M. & A. 33.

On an agreement for a composition, *A.* the creditor received as a further security, the assignment of several debts due to *B.* the debtor. Default was made in payment of the instalments of the composition, and *B.* became bankrupt:—Held, that *A.* might prove the amount of his original debt, but that he could not also retain the benefit of the assignment of the debts. The value of them was therefore directed to be ascertained, and liberty given for *A.* to prove for the difference, if he elected to retain them. *Ex parte Ellis*, 4 Dea. & Chit. 736; S. C. 2 M. & A. 370.

RETAXATION.

Solicitor's bill taxed, and paid six years back, will not be ordered to be retaxed, without special reasons. *Ex parte Hutchinson, re Freeman*, 1834. 4 Dea. & Chit. 580.

REVERSING ADJUDICATION.

On petition to reverse adjudication, copies of depositions will not be granted till hearing. *Ex parte and re Smith*, 2 M. & A. 75.

REVOCABLE ACTS.

After *L.* a trader had committed a secret act of bankruptcy, *M. & Co.* his creditors, knowing him to be embarrassed, pressed him for payment. *L.* said he had no money, but that if they could get a customer for his goods, they should be paid. *M. & Co.* accordingly procured the defendant *A.*, a creditor of their own, to buy goods of *L.* No money passed from *A.* to *L.* or to *M. & Co.*, but *A.* gave *M. & Co.* credit on account. This transaction was communicated to *L.*, and a receipt was given him by *M. & Co.* signed by them, specifying it to be "by payment of defendant *A.* agreeably to his order, balancing their account with him." A fiat having issued against *L.*, his assignees sued *A.* in assumpsit for the price of the goods sold to him:—Held, first, that if the appropriation of the price to *M. & Co.* was parcel of the contract between *A. & L.*, and by its terms irrevocable, the action should have been trover: for by waiving the

tort and affirming the contract, the assignees adopted it in all its parts, though a further question would arise whether the payment relied on by *A.* the defendant, as made in pursuance of the contract, was a payment protected by 6 *Geo. 4. c. 16. s. 82.* Secondly, that if the payment by *A.* the defendant to *M. & Co.* was not stipulated for in the original contract, but was merely directed afterwards by *L.*, and had not been acted on, that direction was revocable by him before his bankruptcy, or by his assignees after that event, and the plaintiffs were entitled to recover. *Bradbury v. Anderton*, 5 *Tyr.* 152; *S. C.* 1 *Crom. M. & R.* 486.

SALE.

See also LEAVE TO BID—PARTICULARS OF SALE.

A. deposits with *B.*, as a security for the repayment of a loan of money, the attested copy of the lease of a coal mine granted to *A.* and four other persons, as tenants in common. The mine was worked by them according to the stipulations of certain articles of partnership, which contained a proviso, that if any one partner wished to dispose of his share the others should have a right of pre-emption:—Held, (*Sir J. Cross, dissent.*), that the usual order could not be made for the sale of *A.*'s share in this property, as in the ordinary case of an equitable mortgage, it being necessary that the partnership accounts should first be taken, for the

purpose of ascertaining *A.*'s share in the property, which this Court had no jurisdiction to do, the other partners not being before the Court. *Ex parte Broadbent, re Borron*, 1834. 4 *Dea. & Chit.* 3; *S. C.* 1 *M. & A.* 635.

A bankrupt having a mortgage term, deposits the mortgage deed with a party, by way of equitable mortgage, and afterwards purchases the equity of redemption:—Held, that the whole of the bankrupt's interest in the property must be sold, and his assignees join in the conveyance to the purchaser. *Ex parte Tuffnell, re Watts*, 1834. 4 *Dea. & Chit.* 29; *S. C.* 1 *M. & A.* 620.

The Court will not interfere in making an order for the sale of mortgaged property, where the circumstances are suspicious, as to the mortgage being a fraudulent preference. *Ex parte Dewdney, re Davy*, 1835. 4 *Dea. & Chit.* 181; *S. C.* 2 *M. & A.* 72.

Where there has been an order made for the sale of mortgaged property, and the sale is afterwards deferred, the mortgagee is entitled to apply the rents and profits in reduction of the interest accruing subsequent to the order of sale and up to the time of taking the account. *Ex parte Ramsbottom, re Penfold*, 1835. 4 *Dea. & Ch.* 198; *S. C.* 2 *M. & A.* 79.

On the sale of the bankrupt's mortgaged property, the Court, in the order for leave to bid, will not direct

that the mortgagee shall not be required to make any deposit. *Ex parte Tatham, re Sheppard*, 1834. 4 Dea. & Ch. 360; S. C. 1 M. & A. 335.

Costs come out of estate where equitable mortgagee applies for leave to bid, and also for sale; *secus*, if merely for leave to bid. *Ex parte Berkeley, re Deacon*, 1834. 4 Dea. & Chit. 572.

Specific performance of sale under Lord Loughborough's Order decreed by this Court, although the following objections were urged: viz. 1st. That particulars of sale did not state that sale took place under order of Court; it appearing that purchaser must have known the fact that it was so. 2d. That a third mortgagee of equity of redemption, and an assignee on prior insolvency of bankrupt, were not parties. 3d. Though the petitioning creditor's debt on which this fiat was founded was contained in the schedule in prior insolvency; especially as the purchaser was presumed to have known of all the objections to the title, and was held to have waived them by granting a lease of the premises purchased by him before the title to him was completed. *Quære*, whether this Court has jurisdiction to direct specific performance of contract of purchase of bankrupt's property, where the purchaser did not know, and had no means of knowing, that the sale took place under order of this Court or of Commissioners? *Ex parte Sidebotham*, 4 Dea. & Chit. 693; S. C. 2 M. & A. 146.

Court will only interfere to order sale of equitable mortgage where there is no dispute. *Ex parte Attwood, re Spooner*, 2 M. & A. 24.

If legal mortgage is ordered by the Commissioners to be sold, the assignees are entitled to the rents to the time of the sale, unless the mortgagee makes an actual entry, or gives notice to the tenant to pay rent to him. *Ex parte Living, re Tombs*, 2 M. & A. 223.

Expenses of.

An execution having issued against a trader, his goods were seized and sold under it, after he had committed an act of bankruptcy. The assignees having brought trover:—Held, that the jury, in assessing the damages, might deduct the expenses of the sale from the proceeds of the goods. *Clarke v. Nicholson*, 5 Tyr. 233; S. C. 6 Carr. & P. 712; 1 Crompt. M. & R. 724.

SANCTIONING PRIVATE ARRANGEMENTS AS TO BANKRUPT'S ESTATE.

See PRIVATE ARRANGEMENTS.

SCANDAL.

A cross-petition by the bankrupt for allowance of the certificate, will not be advanced on motion of course, pending the reference for scandal, of affidavits filed in answer to the petition to stay the certificate, on the ground that the latter petition was improperly served. *Ex parte*

Hetherington, re Glossop, 1833. 4 Dea. & Ch. 217.

Affidavits referred for scandal on motion of course. *Es parte Hetherington, re Glossop*, 1833. 4 Dea. & Chit. 217.

Contrary to *Es parte Pelham* (Mont. 211), held, that any party may apply to refer affidavits for scandal, and that the application need not be by the party scandalized. *Es parte Hetherington, re Glossop*, 1833. 4 Dea. & Chit. 218.

Motion to confirm report as to scandal in affidavits, is a motion of course. *Es parte Hetherington, re Glossop*, 1834. 4 Dea. & Chit. 223.

In cases of scandal, the costs are as between solicitor and client. *Es parte Porter, re Robinson*, 2 M. & A. 220.

Defendant, after putting in his answer, became bankrupt. Plaintiff, before assignees were brought before Court, obtained an order to refer the answer for scandal and impertinence:—Held, that order was regular. *Booth v. Smith*, 5 Sim. 639.

SCHEDULE.

Semble. The discharge of an insolvent under 7 Geo. 4. c. 57., applies only to the debts named in the schedule, and not to all the debts due to the creditors named. *Bishop v. Polhill*, 1 Moody & Rob. 363.

SECOND FIAT.

Where the time for opening a fiat expires, and a second is then

issued by another party, it is no ground for superseding the second, that it did not issue until after the first was actually opened, unless the party issuing the second knew that fact, or was guilty of some fraud. *Es parte Westall, re Fletcher*, 1834. 4 Dea. & Ch. 350.

Where a commission issued in 1823, under which the bankrupt never obtained his certificate, and a fiat issued against him in 1832, the Court refused, under the circumstances, to supersede the fiat. *Es parte Decas, re Kenton*, 1834. 4 Dea. & Chit. 366; S.C. 1 M. & A. 420.

New fiat issued on petition of same petitioning creditor, before time for opening had expired, he having been unable to prove act of bankruptcy before, but one having been since committed. *Es parte Llewellyn, re Williams*, 2 M. & A. 298.

SECURITY.

See also DELIVERY UP OF SECURITY
—RETAINING SECURITY.

The bankrupt kept an account with A., B., and C., as bankers, who afterwards took into partnership the son of C.; after which, the bankrupt executed a legal mortgage to A., B., and C., for securing the repayment of the loan of 6000*l*. Subsequently to this, the bankrupt addressed a letter to Messrs. A., B., and C., authorizing them to consider all the securities they then held as responsible for any advances made, or to be made by them to the bankrupt. Held, that

this letter must be taken to have been addressed by the bankrupt to the four partners, and amounted to an equitable mortgage to the four, of the previous legal mortgage to the three, operating as a security for all the advances made either by the three or the four partners. *Ex parte Parr, re Borron*, 1835. 4 Dea. & Ch. 426.

Where the holder of bills, which were deposited with him by the bankrupts as a collateral security for a debt, proved the amount of the balance due, excepting the bills as a security, and some of the bills were afterwards paid in full:—Held, that the amount of the bills so paid must be deducted from the proof and the dividends calculated only upon the residue of the debt. *Ex parte Brunskill, re Bentley*, 1835. 4 Dea. & Chit. 442; 2 M. & A. 220.

SECURITY FOR COSTS.

Where a plaintiff becomes bankrupt before the trial of a cause, the defendant cannot apply for security for costs till he has ascertained that the assignees have resolved to proceed with the action. A plaintiff declared in time to go to trial at the sittings in Michaelmas term, had not two orders for time to plead been obtained. As the “usual terms” were imposed, viz. inter alia, the accepting short notice of trial, the plaintiff might still have gone to trial at the sittings after that term, but did not. On the 10th January he appeared in the Gazette as a bankrupt, and on the 29th

the issue was delivered;—Held, that an application for security for costs from the assignees, made on the 31st January, was in time. *Walkinshaw v. Marshall*, 4 Tyr. 993.

SERVANTS.

See also MASTER AND SERVANT.

Under the 6 Geo. 4. c. 16. s. 48., it is not requisite to prove a hiring for a year certain, but it must be something more than a mere hiring by the week. (*Ex parte Skinner*, Mont. & Bli. 417, corrected.) *Ex parte* and *re Collier*, 1834. 4 Dea. & Chit. 520.

See also *Thomas v. Williams*, 1 Adol. & Ell. 685.

SERVICE.

See also AFFIDAVIT OF SERVICE—
PETITION, SERVICE OF.

A notice to produce the proceedings must be served on the assignees, not on the bankrupt. *Ex parte* and *re Daly*, 1834. 4 Dea. & Chit. 364.

If fiat is impounded, on the application of *A.*, a petition for its delivery out, presented by *B.*, must be served on *A.* *Ex parte Martin, re Kenton*, 2 M. & A. 293.

On petition to annul on consent, under 6 G. 4. c. 16. ss. 133, 134., the assignees must be served. *Ex parte* and *re Race*, 2 M. & A. 242.

SERVICE SUBSTITUTED.

Where it was sworn that an attorney had no place of residence in

this country, an order nisi for his being struck off the roll was permitted to be served at his last place of residence. *Re Mark*, 1834. 4 Dea. & Chit. 28. See *id.* 482.

Service of order on assignee to elect, to take or reject an agreement, substituted on affidavit of his purposely keeping out of the way. *Sem-ble*, that service, substituted by order, is tantamount to personal service, eo nomine. *Ex parte Blandy, re Foster*, 1834. 4 Dea. & Chit. 518.

SET-OFF.

A. and *B.* have separate banking establishments in Scotland, where it is the custom of the different bankers to exchange the notes they hold of each other at stated periods; *A.* and *B.* were accustomed to make such mutual exchanges accordingly. *B.* becomes bankrupt, when his agent, who conducted the business in Scotland, had in his possession notes of *A.*'s bank to the amount of 230*l.*, while *A.* had notes of *B.* to the amount of 764*l.* *B.*'s agent refuses to exchange the notes for 230*l.*, claiming himself a lien on them; and *B.*'s assignees allow the agent to retain these notes, in satisfaction of such lien:—Held, that *A.* was entitled to recover the value of the notes from the assignees of *B.* *Ex parte National Bank of Scotland, re Maberly*, 1834. 4 Dea. & Chit. 32; S. C. 1 M. & A. 644.

Costs ordered against bankrupt to be set off against those ordered in

his favour. *Ex parte Hawley, re Richards*, 1834. 4 Dea. & Chit. 572.

Held, that a defendant might set off a debt due to him from a bankrupt for money lent, &c. against a claim by the bankrupt's assignees on defendant for not accepting, pursuant to agreement, a bill of exchange by way of part payment for goods sold and delivered by the bankrupt to the defendant. *Gibson v. Bell*, 1 Bing. N. C. 743.

To a declaration in debt by the assignees of a bankrupt, for money received by defendant to the use of plaintiffs as assignees—plea, that the bankrupt before his bankruptcy was indebted to defendant in a greater sum upon an account then stated between them, and that defendant was willing to allow plaintiffs to set off against such debt the debt claimed in the declaration:—Held ill. *Groom v. Mealey*, 2 Bing. N. C. 138.

SETTLEMENT.

By the terms of a settlement made previous to the bankrupt's marriage, all the property of his intended wife was vested in trustees for her separate use, and she was to have all the rights and privileges of a *fême sole*. This property consisted of a hotel and furniture at Brighton, the business of which was conducted entirely by the wife, the bankrupt never living at the hotel, nor in any way interfering in the management of it:—Held, that this

property was not in the reputed ownership of the bankrupt. *Ex parte* and *re Massey*, 1835. 4 Dea. & Chit. 405; S. C. 2 M. & A. 173.

By will the father-in-law of the bankrupt gave 4000*l.* in trust for his daughter for life, to her separate use, then to the bankrupt for life, and then to the issue of the marriage. The will, reciting that the bankrupt was indebted to the testator 6000*l.* on bond, declared that so much of the debt on the bond as remained unpaid in the testator's life-time should go in redemption and satisfaction of the above bequest of 4000*l.* Prior to the bankruptcy, and subsequently by means of dividends from his estate, 1069*l.*, part of the 6000*l.* bond debt, was paid off and invested in the funds. On petition of the assignees, claiming to be entitled to the interest of the 1069*l.*, the wife being dead, held (Sir J. Cross dissent.) that, until the 4000*l.* should be made up, the 1069*l.* should accumulate; after which, the assignees were declared entitled to the interest for the bankrupt's life. *Ex parte Young, re Prior*, 1835. 4 Dea. & Chit. 645.

SOLICITOR AND SOLICITOR'S BILL GENERALLY.

Where it was sworn that an attorney had no place of residence in this country, an order nisi for his being struck off the roll was permitted to be served at his last place of residence. *Re Mark*, 1834. 4 Dea. & Chit. 28. See *id.* 482.

As a general rule, a petition to stay certificate must be served on bankrupt two clear days before the day for which it is answered. But where a petition to stay certificate was answered for the 9th Dec., and on the 7th the bankrupt's solicitor requested the petitioner's solicitor to postpone the hearing of the petition for a week, and undertook to serve it on the bankrupt; *semble*, the bankrupt could not avail himself of the objection to service. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Chit. 218; S. C. 1 M. & A. 607.

Service of petition to stay certificate not properly supported where affidavit merely states inability to serve bankrupt personally, but that bankrupt's solicitor had acknowledged bankrupt to be fully aware of petition and its nature. *Ex parte Levy, re Glossop*, 1835. 4 Dea. & Chit. 224.

Though the rule of another Court for striking an attorney off the roll be produced, *semble*, an order nisi only can be obtained in this Court in the first instance. *Re Mark*, 1834. 4 Dea. & Chit. 482.

If *A.* employs *B.* as solicitor in business, the bill for which is not taxable, and also requires *B.* to strike a docket, and *B.*, because he is not admitted as a solicitor in bankruptcy, employs *C.*, a solicitor of the Court, for that purpose, *B.* cannot divide his bill so as to exclude from taxation the otherwise untaxable items, by procuring *C.*'s bill of costs to be taxed

separately; but *B.*'s own bill and *C.*'s must form one bill, so that all may be taxed. *Scoble*, that business preparatory to striking a docket is taxable in bankruptcy. *Ex parte Cass*, 4 Dea. & Chit. 718; *S. C.* 2 M. & A. 170.

In 1825 an assignment from provisional assignee to assignee was prepared, but through neglect of solicitor never executed. The provisional assignment ordered to be vacated, and a new assignment executed by the Commissioners. It seems the 1 & 2 W. 4, c. 56. s. 25. do not apply in such a case. The solicitor having been paid for the assignment, ordered to refund. *Ex parte Bennett, re Stephens*, 2 M. & A. 306.

An entry in a bankrupt's examination of a certain sum being due to *A.*, is evidence of an account stated between them, and is a sufficient acknowledgment to take the case out of the statute of limitations. But in an action by an attorney for business done, for which no signed bills had been delivered in pursuance of the statute, an admission by the defendant, in an examination before the Commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated. The plaintiff, after being nonsuited, took out a fiat in bankruptcy against the defendant. The Court refused to allow the proceedings to be stayed without costs, on a suggestion that the case

was within the 6 G. 4. c. 16. s. 59. *Eicke v. Nokes*, 4 M. & S. 585; *S. C.* 1 Moody, 359.

SOLICITOR TO FIAT.

It is a matter of course for any creditor who has proved to the amount of 20*l.* to apply within a reasonable time, under the 14th section of 6 Geo. 4. c. 16., for a retaxation of any bill of the solicitor to the commission; but not where a period of three years has been suffered to elapse after payment of such bill. But where the creditor applies to the general jurisdiction of the Court, and points out objectionable items, the Court will then refer the bill to its proper officer, to review the former taxation. Where, however, a bill has been already taxed by the proper officer of the Court in which the business has been done, the Court of Review will not in such case disturb the taxation. What are objectionable items in the solicitor's bill for business connected with the meetings of the Commissioners? *Ex parte Christy, re Barrow*, 1835. 4 Dea. & Chit. 414.

Assignees, on the representation of the solicitor to the commission that he is authorized to receive it as agent, pay over a dividend to such solicitor. It turns out he had no such authority. Upon petition of creditor for payment to him of the dividend, charging that no authority was given to that solicitor:—Held,

that being solicitor to the commission, he might be made respondent as well as the assignees, and that a joint order might be made against them all for its payment. On dividend being withheld, assignees ordered to pay it, with five per cent. interest, from time of application to them for payment. *Es parte Story, re Johnson*, 1834. 4 Dea. & Chit. 504.

Court will not, except under very peculiar circumstances, give leave to solicitor to fiat to bid at sale. *Es parte Towne, re Brown*, 1834. 4 Dea. & Chit. 519.

A. & B. partners, were solicitors to the commission. More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee till within six years. Beyond the six years *A. & B.* (upon an agreement that *A.* should pay all the debts) dissolved partnership; and the assignee, with knowledge of this fact, continued to employ *A.* alone as the solicitor to the commission, and no attempt was made to charge *B.* with the monies received by *A. & B.* till very lately, viz. when an official assignee was appointed. Nor had *B.* ever acknowledged any liability to account:—Held, first, that as between *B.* and the creditors, neither the statute of limitations, nor laches, nor other conduct of the assignee, would operate as a bar, *A. & B.* being solicitors to the commission. But,

secondly, that as the assignee was able to recoup the estate, he could not, under such circumstances of conduct on his part, call on *B.* to account. *A.* had become bankrupt; *semble*, nevertheless, that he or his assignees were necessary parties. *Es parte Gould, re Robertson*, 1834. 4 Dea. & Chit. 547.

There is jurisdiction to reach any part of the bankrupt's estate in the hands of the solicitor to the fiat. *Es parte Benham, re Bramwell*, 2 M. & A. 280.

Solicitor to fiat must bear any expense which his neglect would cause the estate. *Es parte Bennett, re Stephens*, 2 M. & A. 308.

SPECIAL CASE.

Costs of preparing a special case form part of the costs of appeal to the Lord Chancellor, and should be taxed by the officer in Chancery. This Court intimated its opinion to that effect accordingly to such officer. *Es parte Hawley, re Richards*, 1834. 4 Dea. & Chit. 572.

SPECIFIC APPROPRIATION.

See APPROPRIATION SPECIFIC.

SPECIFIC CHATTEL.

Quere, if the C. R. has jurisdiction to entertain a petition seeking delivery up of specific chattel. It has, if parties respondent consent to be bound. But respondent being trustee

cannot consent. *Ex parte Ellison*, 4 Dea. & Chit. 725.

SPECIFIC PERFORMANCE.

The Court of Review has jurisdiction to enforce the specific performance of sale of the bankrupt's mortgaged property, which is sold under the usual order, against the purchaser of such property; and has also authority to decide, on evidence adduced before it, whether the purchaser has accepted the title. *Ex parte Sidebotham*, 3 Dea. & Chit. 818, confirmed on appeal. *Ex parte and re Barrington*, 1835. 4 Dea. & Chit. 461; S. C. 2 M. & A. 245.

Specific performance of sale under Lord Loughborough's Order decreed by this Court, although the following objections were urged: viz. 1st. That particulars of sale did not state that sale took place under order of Court; it appearing that purchaser must have known the fact that it was so. 2d. That a third mortgagee of equity of redemption and an assignee on prior insolvency of bankrupt were not parties. 3d. Though the petitioning creditor's debt on which this fiat was founded was contained in the schedule in prior insolvency; especially as the purchaser was presumed to have known of all the objections to the title, and was held to have waived them by granting a lease of the premises purchased by him before the title to him was completed. *Quære*, whether this Court has jurisdiction to direct specific performance

of contract for purchase of bankrupt's property, where the purchaser did not know, and had no means of knowing, that the sale took place under order of this Court or of Commissioners? *Ex parte Sidebotham*, 4 Dea. & Ch. 693; S. C. 2 M. & A. 146.

The principle of Courts of Equity in regard to cases of specific performance of contracts concerning mere chattels is, that where Courts of Law, by awarding damages, can give adequate compensation, Courts of Equity will not interfere. Therefore that principle cannot apply where the defaulting party has become insolvent: and the Court of Review acts on this principle. *Ex parte Masterman*, 4 Dea. & Chit. 751. S. C. 2 M. & A. 209.

SPLITTING DEMAND.

If *A.* employs *B.* as solicitor in business, the bill for which is not taxable, and also requires *B.* to strike a docket, and *B.*, because he is not admitted as a solicitor in bankruptcy, employs *C.*, a solicitor of the Court, for that purpose. *B.* cannot divide his bill so as to exclude from taxation the otherwise untaxable items, by procuring *C.*'s bill of costs to be taxed separately; but *B.*'s own bill and *C.*'s must form one bill, so that all may be taxed. *Semble*, That business preparatory to striking a docket is taxable in bankruptcy. *Ex parte Cass*, 4 Dea. & Chit. 718; S. C. 2 M. & A. 170:

STAGE-COACH PROPRIETOR.

Semble, coach proprietor, as such, is not a trader. *Re Walker*, 2 M. & A. 267.

STATED AND SETTLED ACCOUNTS.

See ACCOUNTS STATED, &c.

STATUTE OF LIMITATIONS.

A. & B., partners, were solicitors to the commission. More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee till within six years. Beyond the six years *A. & B.* (upon an agreement that *A.* should pay all the debts) dissolved partnership, and the assignee, with knowledge of this fact, continued to employ *A.* alone as the solicitor to the commission, and no attempt was made to charge *B.* with the monies received by *A. & B.* till very lately, viz. when an official assignee was appointed. Nor had *B.* ever acknowledged any liability to account:—Held, first, that, as between *B.* and the creditors, neither the statute of limitations, nor laches, nor other conduct of the assignee, would operate as a bar, *A. & B.* being solicitors to the commission. But, secondly, that as the assignee was able to recoup the estate, he could not, under such circumstances of conduct on his part, call on *B.* to account. *A.* had become bankrupt; *semble*, nevertheless,

that he or his assignees were necessary parties. *Ex parte Gould, re Robertson*, 1834. 4 Dea. & Chit. 547.

An entry in a bankrupt's examination of a certain sum being due to *A.*, is evidence of an account stated between them, and is a sufficient acknowledgment to take the case out of the statute of limitations. But in an action by an attorney for business done, for which no signed bills had been delivered in pursuance of the statute, an admission by the defendant, in an examination before the Commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated. The plaintiff, after being nonsuited, took out a fiat in bankruptcy against the defendant:—The Court refused to allow the proceedings to be stayed without costs, on a suggestion that the case was within the 6 Geo. 4. c. 16. s. 59. *Eicke v. Nokes*, 4 M. & S. 585; S. C. 1 Moody, 359.

STATUTE, CONSTRUCTION OF.

The 132d section of the 6 Geo. 4. c. 16., which directs the payments of interest to creditors in case of a surplus, has not a retrospective operation. *Ex parte Phillips, re Phillips*, 1834. 4 Dea. & Chit. 81; S. C. 1 M. & A. 674.

Under a commission prior to the 1 & 2 Will. 4. c. 56. where an assign-

nee is removed since the act, it is not necessary that there should be a new assignment, or that the prior assignment should be vacated. *Smith v. De Tastet*, 1834. 4 Dea. & Chit. 360; S. C. 1 M. & A. 370.

A creditor whose debt arises on a lost bill of exchange, issues a fiat, which he cannot support, in consequence of his inability to prove the loss of the bill, so as to let in satisfactory evidence of its contents; upon which the assignees obtain an order, that a renewed fiat may issue on the debt of another creditor:—Held, that the petitioning creditor under the new fiat was not exonerated, under these circumstances, from making the payments of 10*l.* and 20*l.* to the Secretary of Bankrupts and the Accountant General, under the provisions of the 45th and 46th sections of Bankruptcy Court Act. *Ex parte Osborne, re Gunning*, 1835. 4 Dea. & Chit. 398; S. C. 2 M. & A. 140.

Under the 6 Geo. 4. c. 16. s. 48. it is not requisite to prove a hiring for a year certain, but it must be something more than a mere hiring by the week. (*Ex parte Skinner*, Mont. & Bli. 417, corrected.) *Ex parte* and *re Collier*, 1834. 4 Dea. & Chit. 520.

The petitioning creditor issued the fiat on a debt of 700*l.*, but the greater part being contracted during the bankrupt's minority, and not for necessities, the debt was reduced below 100*l.*, and was, therefore, insufficient to support the fiat. But the petitioning creditor had also ac-

cepted bills for the accommodation of the bankrupt, which having been indorsed by the bankrupt to *A.*, *A.* proved them under the fiat. The petitioning creditor subsequently paid these bills:—Held, that on indemnifying *A.*, and on presenting a petition in the name of *A.* for that purpose, the petitioning creditor was entitled, under the 6 Geo. 4. c. 16. ss. 18 & 52., as a surety paying the debt, to substitute the debt so proved on the bills by *A.* for the original petitioning creditor's debt, so as to support the fiat, notwithstanding the words "any other creditor," in the 18th section. *Ex parte* and *re Rogers*, 1835. 4 Dea. & Chit. 623; S. C. 2 M. & A. 153.

In 1825 an assignment from provisional assignee to assignees was prepared, but through neglect of solicitor never executed. The provisional assignment ordered to be vacated, and a new assignment executed by the Commissioners. It seems the 1 & 2 Will. 4. c. 56. s. 25. do not apply in such a case. The solicitor having been paid for the assignment, ordered to refund. *Ex parte Bennett, re Stephens*, 2 M. & A. 306.

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statute, an admission by the defendant, in an examination before the Commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated. The plaintiff, after being nonsuited, took out a fiat in bankruptcy against the defendant:—The Court refused to allow the proceedings to be stayed without costs, on a suggestion that the case was within the 6 Geo. 4. c. 16. s. 59. *Eicke v. Nokes*, 4 M. & S. 585; S. C. 1 Moody, 359.

A commission of bankrupt does not operate as a dissolution of the contract of hiring between the bankrupt and his clerk. If the clerk, being hired for a year, continue in the bankrupt's office after the bankruptcy, and then in the middle of the year, by mutual consent, the contract be rescinded, on the understanding that the clerk is to be paid rateably for his services during the current year, the clerk is not barred by the certificate from recovering all the wages due from the expiration of the year last before the commission up to the time of rescinding, no part of such wages being provable under the commission. The provision in 6 Geo. 4. c. 16. s. 48. for payment of clerks and servants, makes no difference in this respect. A jury may infer such an understanding from the clerk having continued after the bankruptcy in the bankrupt's office as long as the bankrupt's brother remained there

managing the business (as he had also done for a month before the bankruptcy), although, in fact, there was nothing for the clerk to do after the bankruptcy. *Thomas v. Williams*, 1 Ad. & El. 685.

In trover by assignees for timber, an arbitrator to whom the cause was referred found that the bankrupt, before his bankruptcy, had on behalf of an unnamed principal (the defendant) taken in exchange a quantity of timber to be delivered free on board; and that he had at the same time bought other timber of the same party on his own account; that the timber was delivered to the bankrupt, and laid till after the bankruptcy, on a common, mixed with other timber of the bankrupt, and in his actual possession; that the defendant, after the bankruptcy, but more than two months before the commission issued, wrote to the vendor, stating himself to be the principal, adopting the contract as to the goods taken in exchange (but no others), and directing that the bankrupt should not be suffered to take them; and that the vendor accepted him as purchaser accordingly. The arbitrator also found, that before the commencement of two months the defendant had required the bankrupt to deliver the timber belonging to him (the defendant), and that the bankrupt had proposed to make up a deficiency in the quantity by delivering some of his own timber: that no contract of sale was made as to the latter, nor did any thing further pass re-

specting the timber till within two months before the commission, when the bankrupt made a formal delivery to the defendant of part of the sold and part of the exchanged timber, lying on the common as above-mentioned; and that the whole of the timber belonging to the defendant was in the order, possession, and disposition of the bankrupt, with the consent of the true owner, till after the bankruptcy:—Held, (assuming that the Court could review the arbitrator's finding as to the above facts):—1. That he was warranted in finding a delivery of the timber to the bankrupt, though it was not shipped. 2. That the timber remained in the bankrupt's apparent possession, with the owner's consent, up to the time of the above delivery. 3. That the delivery to the defendant, of the timber belonging to the bankrupt, was not referable to any contract protected by sect. 81. of the Bankrupt Act. *Shaw v. Harvey*, 1 Adol. & Ellis, 920.

STAYING ATTACHMENT.

Order of committal for disobedience to order to pay into Court, will not be stayed, under any circumstances, unless party has paid the money in, or is ready to do so. *Ex parte Birkett, re Fox*. *Ex parte and re Fox*, 1834. 4 Dea. & Chit. 503.

STAYING CERTIFICATE.

See BANKRUPT'S CERTIFICATE.

STOPPAGE IN TRANSITU.

W. shipped at Leghorn twenty-three casks of oil, on account and by the order of *L.* at Liverpool, and transmitted to him a bill of lading. Before the arrival of the oil, *L.* indorsed the bill of lading, and deposited it with *H.*, who advanced money on it, having previously advanced money on other goods (the property of *L.*) deposited with him. On the arrival of the oil, *L.* having previously become bankrupt, and *W.* not having been paid for it, *W.*'s agents claimed it of the master of the ship; but the latter delivered it to *H.*, who afterwards sold the goods of *L.* as well as the oil of *W.* The net proceeds of the goods belonging to *L.* were sufficient to satisfy the debt due from *L.* to *H.* *H.* paid himself his debt, and deposited the net proceeds of *W.*'s oil with a third person, to abide the event of the award of an arbitrator, to whom all disputes between *W.* and the assignees of *L.* were referred. The arbitrator having stated the above facts on his award for the opinion of this Court:—Held, that *W.*, the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of *L.*, because the property in and the right to the possession was then vested in *H.*, the indorsee of the bill of lading, for value; and further, that *W.* had not, by reason of such claim, any legal right to the possession of the goods after *H.*'s lien was satisfied: but that

in a Court of Equity such transfer to *H.* would be treated as a pledge or mortgage only, and therefore *W.*, by his attempted stoppage in transitu, acquired a right to the goods in equity, subject to *H.*'s lien against the assignees of *L.*:—Held, secondly, that *W.*, by means of his goods, had become surety to *H.* for *L.*'s debt, and had a clear equity to oblige *H.* to pay his debt out of *L.*'s own goods deposited with him in ease of such surety; and all the goods both of *W.* and *L.* having been sold, *W.* might insist on the proceeds of *L.*'s goods being appropriated to payment of the debt: and, therefore, that *W.* was entitled to have all the proceeds of the oil paid over to him. *Re the Arbitration between Westzinthus and Assignees of Lapage and Co.: and between Rogers and Co. and the same Assignees*, 5 Barn. & Adol. 817.

STRANGER.

Contrary to *Ex parte Pelham* (Mont. 211.), held, that any party may apply to refer affidavits for scandal, and that the application need not be by the party scandalized. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Ch. 218.

STRIKING OFF ROLLS.

Where it was sworn that an attorney had no place of residence in this country, an order nisi for his being struck off the roll, was permitted to be served at his last place of resi-

dence. *Re Mark*, 1834. 4 Dea. & Chit. 28. See *id.* 482.

Though the rule of another Court for striking an attorney off the roll be produced, *semble*, an order nisi only can be obtained in this Court in the first instance. *Re Mark*, 1834. 4 Dea. & Chit. 482.

SUBDIVISION COURT.

As to mode of forming, in case of non-attendance of any Commissioner of division, to which cause is referred, 5 & 6 Will. 4. c. 29. s. 23.

Power to administer oaths on affidavit. *Id.* s. 24.

Declared Court of Record from 1 & 2 Will. 4. *Id.* s. 25.

The defendant having been committed to the King's Bench prison by a Court of Bankruptcy, this Court gave the bail time to render, notwithstanding the committal was under a London commission of bankrupt, and the bail had justified after the bankruptcy, after judgment, and at the request of the defendant's attorney. *Waugh v. Ashford*, 1 Bing. N. C. 294; S. C. 1 Scott, 167.

SUBSTITUTED DEBT.

A creditor whose debt arises on a lost bill of exchange, issues a fiat, which he cannot support in consequence of his inability to prove the loss of the bill, so as to let in satisfactory evidence of its contents; upon which the assignees obtain an order, that a renewed fiat may issue on the debt of another creditor:—Held, that

the petitioning creditor under the new fiat was not exonerated, under these circumstances, from making the payments of 10*l.* and 20*l.* to the Secretary of Bankrupts and the Accountant-General, under the provisions of the 45th and 46th sections of the Bankruptcy Court Act. *Ex parte Osborne, re Gunning*, 1835. 4 Dea. & Chit. 398; S. C. 2 M. & A. 140.

On a petition for the substitution of a debt in lieu of the petitioning creditor's debt, under the 6 G. 4. c. 16. s. 18., the costs of the proceeding must be paid by the petitioning creditor, and not out of the bankrupt's estate. *Ex parte Hayne, re Jacobs*, 1835. 4 Dea. & Chit. 403.

SUBSTITUTION OF DEBTORS.

A. & B., partners, were solicitors to the commission. More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee till within six years. Beyond the six years *A. & B.* (upon an agreement that *A.* should pay all the debts) dissolved partnership, and the assignee, with knowledge of this fact, continued to employ *A.* alone as the solicitor to the commission, and no attempt was made to charge *B.* with the monies received by *A. & B.* till very lately, viz. when an official assignee was appointed. Nor had *B.* ever ac-

knowledge any liability to account:—Held, first, that, as between *B.* and the creditors, neither the statute of limitations, nor laches, nor other conduct of the assignee, would operate as a bar, *A. & B.* being solicitors to the commission. But, secondly, that as the assignee was able to recoup the estate, he could not, under such circumstances of conduct on his part, call on *B.* to account. *A.* had become bankrupt; *semble*, nevertheless, that he or his assignees were necessary parties. *Ex parte Gould, re Robertson*, 1834. 4 Dea. & Chit. 547.

A partnership of *A.*, *B.*, & *C.* is dissolved, *A. & B.* agreeing to pay all the partnership debts. *D.*, a creditor of the old firm, ignorant of the terms of the dissolution, applies for payment; and *A. & B.* by letter beg time, and ultimately *D.* draws a bill on *A.*, *B.*, & *C.*, which *A. & B.* accept in the name of *A.*, *B.*, & *C.*, but without *C.*'s authority. *A. & B.* also, by letter signed by them alone, promise payment of the bill. *A. & B.* became bankrupts; *C.* also became bankrupt:—Held, under the circumstances, that *D.* might prove the amount of the bill against *A. & B.*'s estate. *Ex parte Liddiard, re Coward*, 1835. 4 Dea. & Chit. 603.

In 1780 *A.* and *B.* were partners as army agents, having been in the habit of receiving money from the government for the pay of certain regiments. In that year *A.* retires, and *B.* and *C.* carry on the business

as before, but without coming to any account with the Crown, and without any account whatever being taken of the liabilities of the firm of *A.* and *B.* at the time of *A.*'s retiring. In 1783, *B.* & *C.* are required by the government to render the account of monies issued for the several regiments during the period of the existence of the firm of *A.* and *B.* and of *B.* and *C.*, which they do without any break appearing in them at 1780, when *A.* retired. But the accounts rendered do not state any debtor and creditor account as between the respective firms and the Crown, but show simply the sums issued in respect of each regiment, and how they have been applied. On the formation of the firm of *B.* and *C.*, the old ledgers are used; there was no agreement to take to the liabilities of *A.* and *B.*, and every thing is carried on in the same manner as before till 1783, when the 23 Geo. 3. c. 30. was passed, which directs that an estimate is to be thenceforth prepared of the amount which will be required for the purposes of the army; that the amount is to be paid from time to time into the bank; that the paymaster of the forces is to communicate to the Secretary at War the sums that will be required for the purposes of the different regiments; that the agents of the different regiments are to communicate to the Secretary at War the sums that will be required for the different regiments, and an issue

is then made to the agent for the particular purposes of those regiments, and annual accounts were required to be rendered by the several agents. Upon this footing matters are carried on till 1804, when *B.* and *C.* became bankrupts, and a balance of 150,000*l.* is found due to the Crown; and in 1820, and not before, it is found that 91,000*l.*, part of the 150,000*l.*, was due at the time of the retirement of *A.* *Semble*, under these circumstances, that *B.* and *C.* could not be presumed to have adopted the debt of *A.* and *B.*, and that the government could not be presumed to have assented thereto had such adoption existed; and, consequently, that the government had no right to prove the entire sum of 150,000*l.* against *B.* and *C.*'s estate. (*Cross, J. dissent.*) But it also appearing that the assignees had, by proceedings in the Court of Session in Scotland, treated the 91,000*l.* as due from their estate, and the government having, on the other hand, sued the representatives of *A.* in Scotland (subsequently to the discovery of the balance being due) so as to charge *A.* alone as the debtor, a claim was permitted to be entered till the result of the Crown's proceedings, which were still pending against the representatives of *A.* was ascertained. *Es parte Sandham*, 4 Dea. & Chit. 818.

A. & *B.* dissolved partnership, and agreed that the business should be carried on by *B.* alone; and that he should receive and pay all debts.

Sufficient partnership funds were left in his possession. *C.*, a creditor of the firm, afterwards applied for payment of his debt to *B.*, who informed him that *A.* knew nothing of his debt, and that he, *C.*, must look to *B.* alone. *C.* then drew a bill on *B.*, which he accepted, but which was afterwards dishonoured:—Held, in an action brought by *C.* against *A.* & *B.*, (the latter having become bankrupt), that it was a question for the jury, whether it had been agreed between *C.*, the creditor, and *B.*, that the former should accept *B.* as his sole debtor, and take his acceptance in satisfaction of the debt due from both;—Held, further, that such an agreement and receipt of the bill would be a good defence to *A.*'s suit, by way of accord and satisfaction; and that the fact of *B.* having had the partnership effects left in his hands, and having agreed with *A.* to pay all the partnership debts, was evidence of an authority from *A.* to make such agreement on his behalf. After a rule for a new trial had been granted on the above grounds, *A.* also became bankrupt, but *C.* did not prove his debt under the commission. *A.*'s attorney having carried down the record by proviso, *C.* applied for a *stat processus*, alleging that he could derive no benefit from proceeding. The Court refused to interfere. *Thompson v. Percival*, 5 Bar. & Adol. 925.

SUPERSEDING.

See FIAT, ANNULING, &c.

SURETY.

See also PRINCIPAL AND SURETY.

The petitioning creditor issued the fiat on a debt of 700*l.*, but the greater part being contracted during the bankrupt's minority, and not for necessities, the debt was reduced below 100*l.*, and was therefore insufficient to support the fiat. But the petitioning creditor had also accepted bills for the accommodation of the bankrupt, which having been indorsed by the bankrupt to *A.*, *A.* proved them under the fiat. The petitioning creditor subsequently paid these bills:—Held, that on indemnifying *A.*, and on presenting a petition in the name of *A.* for that purpose, the petitioning creditor was entitled, under the 6 *Geo.* 4. c. 10. ss. 18 and 52., as a surety paying the debt, to substitute the debt so proved on the bills by *A.* for the original petitioning creditor's debt, so as to support the fiat, notwithstanding the words "any other creditor" in the 18th section. *Ex parte* and *re Rogers*, 1835. 4 Dea. & Ch. 623; *S. C.* 2 Mont. & A. 153.

A. and *B.* give a joint promissory note, upon which money is lent by *C.* to them, and by them to *D.* *B.* becomes bankrupt, and *A.* is obliged, *after the bankruptcy*, to pay the note. Held, that he is not a surety for *B.*, but that *A.* and *B.* are principal debtors or co-sureties, and therefore that *A.* could not prove for a moiety of the note against *B.*'s estate. *Ex parte Porter*, 4 Dea. & Ch. 774; *S. C.* 2 M. & A. 281.

The instalments of an annuity for the payment of which a bankrupt is surety only, and which he covenants to pay in case of the default of the grantor, are not, where they become due after his bankruptcy, proveable under a fiat against the surety. *Thompson v. Thompson*, 2 Bing. N. C. 168.

SURPLUS.

The 132d section of the 6 Geo. 4. c. 16., which directs the payments of interest to creditors in case of a surplus, has not a retrospective operation. *Ex parte Phillips, re Phillips*, 1834. 4 Dea. & Ch. 81; S. C. 1 M. & A. 674.

SURRENDER.

See BANKRUPT'S SURRENDER—LEAVE TO SURRENDER.

SWEARING AFFIDAVIT.

See AFFIDAVIT, SWEARING.

TAXATION.

See also RETAXATION.

On an application by two creditors to the Commissioners to expunge a proof, under the 6 Geo. 4. c. 16. s. 60., the Commissioners have a discretionary power to adjudge to the creditor whose proof is sought to be expunged, such costs as he may think reasonable, including the costs of the meetings, as well as those of the creditor. And though the Commissioners may have allowed rather too much to the creditor, this will not

make the order bad for the whole allowance, but the objecting parties may have the costs taxed. *Ex parte Kirkaldy, re Holt*, 1834. 4 Dea. & Ch. 52; S. C. 1 M. & A. 642.

Independently of the provisions in the acts of parliament, the Court of Review has a general jurisdiction to refer the bill of any solicitor of that Court for taxation. *Ex parte Copeland, re Burnand*, 1834. 4 Dea. & Ch. 86.

Where the amount of a bill appears on the face of it to be excessive, objectionable items need not be pointed out, on an application by a creditor to have it taxed. *Ex parte Copeland, re Burnand*, 1834. 4 Dea. & Ch. 86.

Where an assignee applies to have a solicitor's bill taxed, for business done before the choice of assignees, which is not included in the bill taxed by the Commissioners, the petition should state the nature of the business, and when it was done, and the proceedings should also be in Court. *Ex parte Cass, re Rivers*, 1835. 4 Dea. & Ch. 273. See this case on subsequent occasion, *id.* 718; and S. C. 2 M. & A. 170.

Where the petitioning creditor's bill, after being taxed by the Commissioners, had been paid, and the assignees accounts had been audited, for the space of six years, the Court refused to order a re-taxation of it by the Registrar. *Ex parte Christy, re Barrow*, 1835. 4 Dea. & Chit. 414.

It is a matter of course for any creditor who has proved to the amount of 20*l.*, to apply within a reasonable time, under the 14th section of 6 *Geo.* 4. c. 16., for a retaxation of any bill of the solicitor to the commission; but not where a period of three years has been suffered to elapse after payment of such bill. *Ex parte Christy, re Barrow*, 1835. 4 *Dea. & Ch.* 414.

But where the creditor applies to the general jurisdiction of the Court, and points out objectionable items, the Court will then refer the bill to its proper officer to review the former taxation. *Id.*

Where, however, a bill has been already taxed by the proper officer of the Court in which the business has been done, the Court of Review will not in such case disturb the taxation. What are objectionable items in the solicitor's bill for business connected with the meetings of the Commissioners? *Id.*

If *A.* employs *B.* as solicitor in business, the bill for which is not taxable, and also requires *B.* to strike a docket, and *B.*, because he is not admitted as a solicitor in bankruptcy, employs *C.*, a solicitor of the Court, for that purpose. *B.* cannot divide his bill so as to exclude from taxation the otherwise untaxable items, by procuring *C.*'s bill of costs to be taxed separately; but *B.*'s own bill and *C.*'s must form one bill, so that all may be taxed. *Semble*, that business preparatory to striking a docket is tax-

able in bankruptcy. *Ex parte Cass*, 4 *Dea. & Ch.* 718; *S. C.* 2 *M. & A.* 170.

TENANT.

See LANDLORD AND TENANT.

TITLE.

A bankrupt having a mortgage term deposits the mortgage deed with a party, by way of equitable mortgages, and afterwards purchases the equity of redemption:—Held, that the whole of the bankrupt's interest in the property must be sold, and his assignees join in the conveyance to the purchaser. *Ex parte Tuffnell, re Watts*, 1834. 4 *Dea. & Ch.* 29; *S. C.* 1 *M. & A.* 620.

Where a creditor applies to prove a debt, and claims a right to property in his possession, to which the Commissioners think he has no lien, the Commissioners should admit the proof, and leave the question of lien to be controlled merely by retention of the dividend. *Ex parte Dobson, re Thompson*, 1834. 4 *Dea. & Chit.* 69; *S. C.* 1 *M. & A.* 666.

The mere circumstance of a creditor coming in under the commission to prove or claim a debt, only gives the Court jurisdiction as to the proof or claim, and not over any property in his possession, of which he claims the legal ownership. *Ex parte Dobson, re Thompson*, 1834. 4 *Dea. & Chit.* 69; *S. C.* 1 *M. & A.* 666.

The Court of Review has jurisdiction to enforce the specific per-

formance of a contract of sale of the bankrupt's mortgaged property, which is sold under the usual order, against the purchaser of such property; and has also authority to decide, on evidence adduced before it, whether the purchaser has accepted the title. *Ex parte Sidebotham*, 3 Dea. & Chit. 818, confirmed on appeal. *Ex parte Barrington, re Barrington*, 1835. 4 Dea. & Chit. 461; *S. C.* 2 M. & A. 245.

H. & P., drawers of a bill on and accepted by *P. & Co.*, for 2000*l.*, indorse it to *A.* for his accommodation. *W. & Co.* discount it for *A.*, together with another bill drawn by *A.* for 2000*l.* upon and accepted by *S. & Co.* *A.*, and *H. & P.*, and *S. & Co.* severally become bankrupts. *W. & Co.* receive dividends from *S. & Co.*'s estate 666*l.* 13*s.* 4*d.* on *S. & Co.*'s acceptance; also 750*l.* from *H. & P.*'s estate on the bill drawn by them. They also prove against *A.*'s estate for 3333*l.* 6*s.* 8*d.*, as the amount of *H. & P.*'s bill, and balance of *A.*'s bill on *S. & Co.*, after deducting the 666*l.* 13*s.* 4*d.* received from *S. & Co.*, and receive 277*l.* 15*s.* 6½*d.* dividend thereon; 166*l.* 13*s.* 4*d.* being in respect of the proportion of proof on *H. & P.*'s bill. *P. & Co.* stopped payment, and under a composition deed *W. & Co.* receive 1000*l.* in respect of *H. & P.*'s bill of 1916*l.* 13*s.* 4*d.*; balance 83*l.* 6*s.* 8*d.* *Semble*, (*W. & Co.* claiming to have a right to retain *H. & P.*'s bill, in order to work out their remedies against *A.* in respect

of *A.*'s bill,) that the assignees of *H. & P.*, although they tendered the balance 83*l.* 6*s.* 8*d.*, could not compel *W. & Co.* to deliver up *H. & P.*'s bill. *Quære*, whether the Court has jurisdiction on a subject of litigated title such as this. Held, that as *W. & Co.* were not bound to receive the 83*l.* 6*s.* 8*d.*, the petition was premature at all events till the bill was fully paid off. *Ex parte Dickson, re Hutchinson*, 1835. 4 Dea. & Ch. 614.

TRADER AND TRADING.

See also BANKRUPT, WHO MAY BE.

Although no evidence of trading on proceedings, fiat will not be superseded if bankrupt admitted to petitioning creditor that he was a trader. *Ex parte* and *re Bailey*, 2 M. & A. 86.

Semble, coach proprietor, as such, is not a trader. *Re Walker*, 2 M. & A. 267.

B., who was indebted to *G.* in a sum exceeding 100*l.*, became a trader in Scotland, and after the discontinuance of his trade, but before the concerns of his trade were wound up, and being still indebted to *G.*, committed an act of bankruptcy:—Held, that he was liable to a sequestration as a notour bankrupt, upon debt, trading, and act of bankruptcy. *Baillie v. Grant*, 6 Bligh, 459.

Personal property may be transferred for a sufficient consideration, without writing, if the possession be also transferred; and a debtor may prefer one creditor to another, if the

debtor be not a trader ; but if he be a trader he cannot prefer one creditor to another, unless he be pressed. A fraudulent delivery of goods by a trader will be of itself an act of bankruptcy. A delivery of goods to one to whom no debt was due would be such a fraudulent delivery ; and the delivery would likewise be fraudulent, though a debt was due, if the transfer of the goods was made voluntarily, and in contemplation of bankruptcy. *Scott v. Thomas*, 6 C. & P. 611.

TRANSFER OF PETITION TO C. R.

Petition presented to the Lord Chancellor before 1 & 2 Will. 4. c. 56., must be transferred by the Lord Chancellor to the Court of Review, before that Court can hear it. *Re Stokes*, 1835. 4 Dea. & Chit. 578.

TRANSFER.

Personal property may be transferred for a sufficient consideration, without writing, if the possession be also transferred ; and a debtor may prefer one creditor to another, if the debtor be not a trader ; but if he be a trader he cannot prefer one creditor to another, unless he be pressed. A fraudulent delivery of goods by a trader will be of itself an act of bankruptcy. A delivery of goods to one to whom no debt was due would be such a fraudulent delivery ; and the delivery would likewise be fraudulent, though a debt was due, if the transfer of the goods was made voluntarily,

and in contemplation of bankruptcy. *Scott v. Thomas*, 6 C. & P. 611.

TRUST.

See also DECLARATION OF TRUST.

By the rules of an insurance company, no person, except a director, was permitted to hold more than two shares in his own name ; but no rule prevented a person from being beneficially entitled to more than two shares, by holding them in the name of another party. The petitioner, who was already the holder of two shares, having purchased two other shares, caused them to be entered in the name of the bankrupt in the company's books, with the knowledge of one of the directors and the actuary. The bankrupt signed a declaration of trust, that he held the shares as trustee for the petitioner, but no notice of the trust was taken in the books of the company ; and he continued to receive the dividends on the shares, accounting for them from time to time to the petitioner, up to the period of his bankruptcy, when the shares were still standing in his name. Held, that the shares did not pass to his assignees, as being in his order and disposition at the time of his bankruptcy. *Ex parte Watkins, re Kidder*, 1834. 4 Dea. & Ch. 87 ; S. C. 1 M. & A. 689.

M. and *A.*, partners, were consignees of a West India estate, and in that character became creditors to the estate. By deed, long prior to the

STAGE-COACH PROPRIETOR.

Semble, coach proprietor, as such, is not a trader. *Re Walker*, 2 M. & A. 267.

STATED AND SETTLED ACCOUNTS.

See ACCOUNTS STATED, &c.

STATUTE OF LIMITATIONS.

A. & B., partners, were solicitors to the commission. More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee till within six years. Beyond the six years *A. & B.* (upon an agreement that *A.* should pay all the debts) dissolved partnership, and the assignee, with knowledge of this fact, continued to employ *A.* alone as the solicitor to the commission, and no attempt was made to charge *B.* with the monies received by *A. & B.* till very lately, viz. when an official assignee was appointed. Nor had *B.* ever acknowledged any liability to account:—Held, first, that, as between *B.* and the creditors, neither the statute of limitations, nor laches, nor other conduct of the assignee, would operate as a bar, *A. & B.* being solicitors to the commission. But, secondly, that as the assignee was able to recoup the estate, he could not, under such circumstances of conduct on his part, call on *B.* to account. *A.* had become bankrupt; *semble*, nevertheless,

that he or his assignees were necessary parties. *Ex parte Gould, re Robertson*, 1834. 4 Dea. & Chit. 547.

An entry in a bankrupt's examination of a certain sum being due to *A.*, is evidence of an account stated between them, and is a sufficient acknowledgment to take the case out of the statute of limitations. But in an action by an attorney for business done, for which no signed bills had been delivered in pursuance of the statute, an admission by the defendant, in an examination before the Commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated. The plaintiff, after being nonsuited, took out a fiat in bankruptcy against the defendant:—The Court refused to allow the proceedings to be stayed without costs, on a suggestion that the case was within the 6 Geo. 4. c. 16. s. 59. *Eicke v. Nokes*, 4 M. & S. 585; *S. C.* 1 Moody, 359.

STATUTE, CONSTRUCTION OF.

The 132d section of the 6 Geo. 4. c. 16., which directs the payments of interest to creditors in case of a surplus, has not a retrospective operation. *Ex parte Phillips, re Phillips*, 1834. 4 Dea. & Chit. 81; *S. C.* 1 M. & A. 674.

Under a commission prior to the 1 & 2 Will. 4. c. 56. where an assign-

nee is removed since the act, it is not necessary that there should be a new assignment, or that the prior assignment should be vacated. *Smith v. De Tastet*, 1834. 4 Dea. & Chit. 360; S. C. 1 M. & A. 370.

A creditor whose debt arises on a lost bill of exchange, issues a fiat, which he cannot support, in consequence of his inability to prove the loss of the bill, so as to let in satisfactory evidence of its contents; upon which the assignees obtain an order, that a renewed fiat may issue on the debt of another creditor:—Held, that the petitioning creditor under the new fiat was not exonerated, under these circumstances, from making the payments of 10*l.* and 20*l.* to the Secretary of Bankrupts and the Accountant General, under the provisions of the 45th and 46th sections of Bankruptcy Court Act. *Ex parte Osborne, re Gunning*, 1835. 4 Dea. & Chit. 398; S. C. 2 M. & A. 140.

Under the 6 Geo. 4. c. 16. s. 48. it is not requisite to prove a hiring for a year certain, but it must be something more than a mere hiring by the week. (*Ex parte Skinner*, Mont. & Bli. 417, corrected.) *Ex parte and re Collier*, 1834. 4 Dea. & Chit. 590.

The petitioning creditor issued the fiat on a debt of 700*l.*, but the greater part being contracted during the bankrupt's minority, and not for necessities, the debt was reduced below 100*l.*, and was, therefore, insufficient to support the fiat. But the petitioning creditor had also ac-

cepted bills for the accommodation of the bankrupt, which having been indorsed by the bankrupt to *A.*, proved them under the fiat. The petitioning creditor subsequently paid these bills:—Held, that on indemnifying *A.*, and on presenting a petition in the name of *A.* for that purpose, the petitioning creditor was entitled, under the 6 Geo. 4. c. 16. ss. 18 & 52., as a surety paying the debt, to substitute the debt so proved on the bills by *A.* for the original petitioning creditor's debt, so as to support the fiat, notwithstanding the words "any other creditor," in the 18th section. *Ex parte and re Rogers*, 1835. 4 Dea. & Chit. 623; S. C. 2 M. & A. 153.

In 1825 an assignment from provisional assignee to assignees was prepared, but through neglect of solicitor never executed. The provisional assignment ordered to be vacated, and a new assignment executed by the Commissioners. It seems the 1 & 2 Will. 4. c. 56. s. 25. do not apply in such a case. The solicitor having been paid for the assignment, ordered to refund. *Ex parte Bennett, re Stephens*, 2 M. & A. 306.

An entry in a bankrupt's examination of a certain sum being due to *A.* is evidence of an account stated between them, and is a sufficient acknowledgment to take the case out of the statute of limitations. But in an action by an attorney for business done, for which no signed bills had been delivered in pursuance of the

statute, an admission by the defendant, in an examination before the Commissioners under a commission of bankrupt since superseded, that the sum claimed was due, is not sufficient evidence to support a count upon an account stated. The plaintiff, after being nonsuited, took out a fiat in bankruptcy against the defendant:—The Court refused to allow the proceedings to be stayed without costs, on a suggestion that the case was within the 6 *Geo. 4. c. 16. s. 59. Eicke v. Nokes*, 4 M. & S. 585; S. C. 1 Moody, 359.

A commission of bankrupt does not operate as a dissolution of the contract of hiring between the bankrupt and his clerk. If the clerk, being hired for a year, continue in the bankrupt's office after the bankruptcy, and then in the middle of the year, by mutual consent, the contract be rescinded, on the understanding that the clerk is to be paid rateably for his services during the current year, the clerk is not barred by the certificate from recovering all the wages due from the expiration of the year last before the commission up to the time of rescinding, no part of such wages being provable under the commission. The provision in 6 *Geo. 4. c. 16. s. 48.* for payment of clerks and servants, makes no difference in this respect. A jury may infer such an understanding from the clerk having continued after the bankruptcy in the bankrupt's office as long as the bankrupt's brother remained there

managing the business (as he had also done for a month before the bankruptcy), although, in fact, there was nothing for the clerk to do after the bankruptcy. *Thomas v. Williams*, 1 Ad. & El. 685.

In trover by assignees for timber, an arbitrator to whom the cause was referred found that the bankrupt, before his bankruptcy, had on behalf of an unnamed principal (the defendant) taken in exchange a quantity of timber to be delivered free on board; and that he had at the same time bought other timber of the same party on his own account; that the timber was delivered to the bankrupt, and laid till after the bankruptcy, on a common, mixed with other timber of the bankrupt, and in his actual possession: that the defendant, after the bankruptcy, but more than two months before the commission issued, wrote to the vendor, stating himself to be the principal, adopting the contract as to the goods taken in exchange (but no others), and directing that the bankrupt should not be suffered to take them; and that the vendor accepted him as purchaser accordingly. The arbitrator also found, that before the commencement of two months the defendant had required the bankrupt to deliver the timber belonging to him (the defendant), and that the bankrupt had proposed to make up a deficiency in the quantity by delivering some of his own timber: that no contract of sale was made as to the latter, nor did any thing further pass re-

specting the timber till within two months before the commission, when the bankrupt made a formal delivery to the defendant of part of the sold and part of the exchanged timber, lying on the common as above-mentioned; and that the whole of the timber belonging to the defendant was in the order, possession, and disposition of the bankrupt, with the consent of the true owner, till after the bankruptcy:—Held, (assuming that the Court could review the arbitrator's finding as to the above facts):—1. That he was warranted in finding a delivery of the timber to the bankrupt, though it was not shipped. 2. That the timber remained in the bankrupt's apparent possession, with the owner's consent, up to the time of the above delivery. 3. That the delivery to the defendant, of the timber belonging to the bankrupt, was not referable to any contract protected by sect. 81. of the Bankrupt Act. *Shaw v. Harvey*, 1 Adol. & Ellis, 920.

STAYING ATTACHMENT.

Order of committal for disobedience to order to pay into Court, will not be stayed, under any circumstances, unless party has paid the money in, or is ready to do so. *Ex parte Birkett, re Fox*. *Ex parte and re Fox*, 1834. 4 Dea. & Chit. 503.

STAYING CERTIFICATE.

See BANKRUPT'S CERTIFICATE.

STOPPAGE IN TRANSITU.

W. shipped at Leghorn twenty-three casks of oil, on account and by the order of *L.* at Liverpool, and transmitted to him a bill of lading. Before the arrival of the oil, *L.* indorsed the bill of lading, and deposited it with *H.*, who advanced money on it, having previously advanced money on other goods (the property of *L.*) deposited with him. On the arrival of the oil, *L.* having previously become bankrupt, and *W.* not having been paid for it, *W.*'s agents claimed it of the master of the ship; but the latter delivered it to *H.*, who afterwards sold the goods of *L.* as well as the oil of *W.* The net proceeds of the goods belonging to *L.* were sufficient to satisfy the debt due from *L.* to *H.* *H.* paid himself his debt, and deposited the net proceeds of *W.*'s oil with a third person, to abide the event of the award of an arbitrator, to whom all disputes between *W.* and the assignees of *L.* were referred. The arbitrator having stated the above facts on his award for the opinion of this Court:—Held, that *W.*, the unpaid vendor of the oil, had, at the time when his agents claimed it, no right to take possession on the insolvency of *L.*, because the property in and the right to the possession was then vested in *H.*, the indorsee of the bill of lading, for value; and further, that *W.* had not, by reason of such claim, any legal right to the possession of the goods after *H.*'s lien was satisfied: but that

a Court of Equity such transfer to . would be treated as a pledge or mortgage only, and therefore *W.*, by *s attempted* stoppage in transitu, acquired a right to the goods in equity, subject to *H.*'s lien against the assignees of *L.*:—Held, secondly, that *W.*, by means of his goods, had become surety to *H.* for *L.*'s debt, and had a clear equity to oblige *H.* to pay his debt out of *L.*'s own goods deposited with him in ease of such surety; and all the goods both of *W.* and *L.* having been sold, *W.* might insist on the proceeds of *L.*'s goods being appropriated to payment of the debt: and, therefore, that *W.* was entitled to have all the proceeds of the oil paid over to him. *Re the Arbitration between Westzinthus and Assignees of Lapage and Co.: and between Rogers and Co. and the same Assignees*, 5 Barn. & Adol. 817.

STRANGER.

Contrary to *Ex parte Pelham* (Mont. 211.), held, that any party may apply to refer affidavits for scandal, and that the application need not be by the party scandalized. *Ex parte Hetherington, re Glossop*, 1833. 4 Dea. & Ch. 218.

STRIKING OFF ROLLS.

Where it was sworn that an attorney had no place of residence in this country, an order nisi for his being struck off the roll, was permitted to be served at his last place of resi-

dence. *Re Mark*, 1834. 4 Dea. & Chit. 28. See *id.* 482.

Though the rule of another Court for striking an attorney off the roll be produced, *semble*, an order nisi only can be obtained in this Court in the first instance. *Re Mark*, 1834. 4 Dea. & Chit. 482.

SUBDIVISION COURT.

As to mode of forming, in case of non-attendance of any Commissioner of division, to which cause is referred, 5 & 6 Will. 4. c. 29. s. 23.

Power to administer oaths on affidavit. *Id.* s. 24.

Declared Court of Record from 1 & 2 Will. 4. *Id.* s. 25.

The defendant having been committed to the King's Bench prison by a Court of Bankruptcy, this Court gave the bail time to render, notwithstanding the committal was under a London commission of bankrupt, and the bail had justified after the bankruptcy, after judgment, and at the request of the defendant's attorney. *Waugh v. Ashford*, 1 Bing. N. C. 294; *S. C.* 1 Scott, 167.

SUBSTITUTED DEBT.

A creditor whose debt arises on a lost bill of exchange, issues a fiat, which he cannot support in consequence of his inability to prove the loss of the bill, so as to let in satisfactory evidence of its contents; upon which the assignees obtain an order, that a renewed fiat may issue on the debt of another creditor:—Held, that

the petitioning creditor under the new fiat was not exonerated, under these circumstances, from making the payments of 10*l.* and 20*l.* to the Secretary of Bankrupts and the Accountant-General, under the provisions of the 45th and 46th sections of the Bankruptcy Court Act. *Ex parte Osborne, re Gunning*, 1835. 4 Dea. & Chit. 398; S. C. 2 M. & A. 140.

On a petition for the substitution of a debt in lieu of the petitioning creditor's debt, under the 6 G. 4. c. 16. s. 18., the costs of the proceeding must be paid by the petitioning creditor, and not out of the bankrupt's estate. *Ex parte Hayne, re Jacobs*, 1835. 4 Dea. & Chit. 403.

SUBSTITUTION OF DEBTORS.

A. & B., partners, were solicitors to the commission. More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee till within six years. Beyond the six years *A. & B.* (upon an agreement that *A.* should pay all the debts) dissolved partnership, and the assignee, with knowledge of this fact, continued to employ *A.* alone as the solicitor to the commission, and no attempt was made to charge *B.* with the monies received by *A. & B.* till very lately, viz. when an official assignee was appointed. Nor had *B.* ever ac-

knowledged any liability to account:—Held, first, that, as between *B.* and the creditors, neither the statute of limitations, nor laches, nor other conduct of the assignee, would operate as a bar, *A. & B.* being solicitors to the commission. But, secondly, that as the assignee was able to recoup the estate, he could not, under such circumstances of conduct on his part, call on *B.* to account. *A.* had become bankrupt; *semble*, nevertheless, that he or his assignees were necessary parties. *Ex parte Gould, re Robertson*, 1834. 4 Dea. & Chit. 547.

A partnership of *A.*, *B.*, & *C.* is dissolved, *A. & B.* agreeing to pay all the partnership debts. *D.*, a creditor of the old firm, ignorant of the terms of the dissolution, applies for payment; and *A. & B.* by letter beg time, and ultimately *D.* draws a bill on *A.*, *B.*, & *C.*, which *A. & B.* accept in the name of *A.*, *B.*, & *C.*, but without *C.*'s authority. *A. & B.* also, by letter signed by them alone, promise payment of the bill. *A. & B.* became bankrupts; *C.* also became bankrupt:—Held, under the circumstances, that *D.* might prove the amount of the bill against *A. & B.*'s estate. *Ex parte Liddiard, re Coward*, 1835. 4 Dea. & Chit. 603.

In 1780 *A.* and *B.* were partners as army agents, having been in the habit of receiving money from the government for the pay of certain regiments. In that year *A.* retires, and *B.* and *C.* carry on the business

as before, but without coming to any account with the Crown, and without any account whatever being taken of the liabilities of the firm of *A.* and *B.* at the time of *A.*'s retiring. In 1783, *B. & C.* are required by the government to render the account of monies issued for the several regiments during the period of the existence of the firm of *A.* and *B.* and of *B.* and *C.*, which they do without any break appearing in them at 1780, when *A.* retired. But the accounts rendered do not state any debtor and creditor account as between the respective firms and the Crown, but show simply the sums issued in respect of each regiment, and how they have been applied. On the formation of the firm of *B.* and *C.*, the old ledgers are used; there was no agreement to take to the liabilities of *A.* and *B.*, and every thing is carried on in the same manner as before till 1783, when the 23 Geo. 3. c. 30. was passed, which directs that an estimate is to be thenceforth prepared of the amount which will be required for the purposes of the army; that the amount is to be paid from time to time into the bank; that the paymaster of the forces is to communicate to the Secretary at War the sums that will be required for the purposes of the different regiments; that the agents of the different regiments are to communicate to the Secretary at War the sums that will be required for the different regiments, and an issue

is then made to the agent for the particular purposes of those regiments, and annual accounts were required to be rendered by the several agents. Upon this footing matters are carried on till 1804, when *B.* and *C.* became bankrupts, and a balance of 150,000*l.* is found due to the Crown; and in 1820, and not before, it is found that 91,000*l.*, part of the 150,000*l.*, was due at the time of the retirement of *A.* *Seemle*, under these circumstances, that *B.* and *C.* could not be presumed to have adopted the debt of *A.* and *B.*, and that the government could not be presumed to have assented thereto had such adoption existed; and, consequently, that the government had no right to prove the entire sum of 150,000*l.* against *B.* and *C.*'s estate. (*Cross, J. dissent.*) But it also appearing that the assignees had, by proceedings in the Court of Session in Scotland, treated the 91,000*l.* as due from their estate, and the government having, on the other hand, sued the representatives of *A.* in Scotland (subsequently to the discovery of the balance being due) so as to charge *A.* alone as the debtor, a claim was permitted to be entered till the result of the Crown's proceedings, which were still pending against the representatives of *A.* was ascertained. *Es parte Sandham*, 4 Dea. & Chit. 818.

A. & B. dissolved partnership, and agreed that the business should be carried on by *B.* alone; and that he should receive and pay all debts.

Sufficient partnership funds were left in his possession. *C.*, a creditor of the firm, afterwards applied for payment of his debt to *B.*, who informed him that *A.* knew nothing of his debt, and that he, *C.*, must look to *B.* alone. *C.* then drew a bill on *B.*, which he accepted, but which was afterwards dishonoured:—Held, in an action brought by *C.* against *A. & B.*, (the latter having become bankrupt), that it was a question for the jury, whether it had been agreed between *C.*, the creditor, and *B.*, that the former should accept *B.* as his sole debtor, and take his acceptance in satisfaction of the debt due from both;—Held, further, that such an agreement and receipt of the bill would be a good defence to *A.*'s suit, by way of accord and satisfaction; and that the fact of *B.* having had the partnership effects left in his hands, and having agreed with *A.* to pay all the partnership debts, was evidence of an authority from *A.* to make such agreement on his behalf. After a rule for a new trial had been granted on the above grounds, *A.* also became bankrupt, but *C.* did not prove his debt under the commission. *A.*'s attorney having carried down the record by proviso, *C.* applied for a *stat processus*, alleging that he could derive no benefit from proceeding. The Court refused to interfere. *Thompson v. Percival*, 5 Bar. & Adol. 925.

SUPERSEDING.

See FIAT, ANNULLING, &c.

SURETY.

See also PRINCIPAL AND SURETY.

The petitioning creditor issued the fiat on a debt of 700*l.*, but the greater part being contracted during the bankrupt's minority, and not for necessities, the debt was reduced below 100*l.*, and was therefore insufficient to support the fiat. But the petitioning creditor had also accepted bills for the accommodation of the bankrupt, which having been indorsed by the bankrupt to *A.*, *A.* proved them under the fiat. The petitioning creditor subsequently paid these bills:—Held, that on indemnifying *A.*, and on presenting a petition in the name of *A.* for that purpose, the petitioning creditor was entitled, under the 6 *Geo.* 4. c. 10. ss. 18 and 52., as a surety paying the debt, to substitute the debt so proved on the bills by *A.* for the original petitioning creditor's debt, so as to support the fiat, notwithstanding the words "any other creditor" in the 18th section. *Ex parte* and *re Rogers*, 1835. 4 *Dea. & Ch.* 623; *S. C.* 2 *Mont. & A.* 153.

A. and *B.* give a joint promissory note, upon which money is lent by *C.* to them, and by them to *D.* *B.* becomes bankrupt, and *A.* is obliged, after the bankruptcy, to pay the note. Held, that he is not a surety for *B.*, but that *A.* and *B.* are principal debtors or co-sureties, and therefore that *A.* could not prove for a moiety of the note against *B.*'s estate. *Ex parte Porter*, 4 *Dea. & Ch.* 774; *S. C.* 2 *M. & A.* 281.

The instalments of an annuity for the payment of which a bankrupt is surety only, and which he covenants to pay in case of the default of the grantor, are not, where they become due after his bankruptcy, proveable under a fiat against the surety. *Thompson v. Thompson*, 2 Bing. N. C. 168.

SURPLUS.

The 132d section of the 6 Geo. 4. c. 16., which directs the payments of interest to creditors in case of a surplus, has not a retrospective operation. *Ex parte Phillips, re Phillips*, 1834. 4 Dea. & Ch. 81; S. C. 1 M. & A. 674.

SURRENDER.

See BANKRUPT'S SURRENDER—LEAVE TO SURRENDER.

SWEARING AFFIDAVIT.

See AFFIDAVIT, SWEARING.

TAXATION.

See also RETAXATION.

On an application by two creditors to the Commissioners to expunge a proof, under the 6 Geo. 4. c. 16. s. 60., the Commissioners have a discretionary power to adjudge to the creditor whose proof is sought to be expunged, such costs as he may think reasonable, including the costs of the meetings, as well as those of the creditor. And though the Commissioners may have allowed rather too much to the creditor, this will not

make the order bad for the whole allowance, but the objecting parties may have the costs taxed. *Ex parte Kirkaldy, re Holt*, 1834. 4 Dea. & Ch. 52; S. C. 1 M. & A. 642.

Independently of the provisions in the acts of parliament, the Court of Review has a general jurisdiction to refer the bill of any solicitor of that Court for taxation. *Ex parte Copeland, re Burnand*, 1834. 4 Dea. & Ch. 86.

Where the amount of a bill appears on the face of it to be excessive, objectionable items need not be pointed out, on an application by a creditor to have it taxed. *Ex parte Copeland, re Burnand*, 1834. 4 Dea. & Ch. 86.

Where an assignee applies to have a solicitor's bill taxed, for business done before the choice of assignees, which is not included in the bill taxed by the Commissioners, the petition should state the nature of the business, and when it was done, and the proceedings should also be in Court. *Ex parte Cass, re Rivers*, 1835. 4 Dea. & Ch. 273. See this case on subsequent occasion, *id.* 718; and S. C. 2 M. & A. 170.

Where the petitioning creditor's bill, after being taxed by the Commissioners, had been paid, and the assignees accounts had been audited, for the space of six years, the Court refused to order a re-taxation of it by the Registrar. *Ex parte Christy, re Barrow*, 1835. 4 Dea. & Chit. 414.

It is a matter of course for any creditor who has proved to the amount of 20*l.*, to apply within a reasonable time, under the 14th section of 6 *Geo.* 4. c. 16., for a retaxation of any bill of the solicitor to the commission; but not where a period of three years has been suffered to elapse after payment of such bill. *Ex parte Christy, re Barrow*, 1835. 4 Dea. & Ch. 414.

But where the creditor applies to the general jurisdiction of the Court, and points out objectionable items, the Court will then refer the bill to its proper officer to review the former taxation. *Id.*

Where, however, a bill has been already taxed by the proper officer of the Court in which the business has been done, the Court of Review will not in such case disturb the taxation. What are objectionable items in the solicitor's bill for business connected with the meetings of the Commissioners? *Id.*

If *A.* employs *B.* as solicitor in business, the bill for which is not taxable, and also requires *B.* to strike a docket, and *B.*, because he is not admitted as a solicitor in bankruptcy, employs *C.*, a solicitor of the Court, for that purpose. *B.* cannot divide his bill so as to exclude from taxation the otherwise untaxable items, by procuring *C.*'s bill of costs to be taxed separately; but *B.*'s own bill and *C.*'s must form one bill, so that all may be taxed. *Semble*, that business preparatory to striking a docket is tax-

able in bankruptcy. *Ex parte Cas*, 4 Dea. & Ch. 718; *S. C.* 2 M. & A. 170.

TENANT.

See LANDLORD AND TENANT.

TITLE.

A bankrupt having a mortgage term deposits the mortgage deed with a party, by way of equitable mortgages, and afterwards purchases the equity of redemption:—Held, that the whole of the bankrupt's interest in the property must be sold, and his assignees join in the conveyance to the purchaser. *Ex parte Tuffnell, re Watts*, 1834. 4 Dea. & Ch. 29; *S. C.* 1 M. & A. 620.

Where a creditor applies to prove a debt, and claims a right to property in his possession, to which the Commissioners think he has no lien, the Commissioners should admit the proof, and leave the question of lien to be controlled merely by retention of the dividend. *Ex parte Dobson, re Thompson*, 1834. 4 Dea. & Chit. 69; *S. C.* 1 M. & A. 666.

The mere circumstance of a creditor coming in under the commission to prove or claim a debt, only gives the Court jurisdiction as to the proof or claim, and not over any property in his possession, of which he claims the legal ownership. *Ex parte Dobson, re Thompson*, 1834. 4 Dea. & Chit. 69; *S. C.* 1 M. & A. 666.

The Court of Review has jurisdiction to enforce the specific per-

formance of a contract of sale of the bankrupt's mortgaged property, which is sold under the usual order, against the purchaser of such property; and has also authority to decide, on evidence adduced before it, whether the purchaser has accepted the title. *Ex parte Sidebotham*, 3 Dea. & Chit. 818, confirmed on appeal. *Ex parte Barrington, re Barrington*, 1835. 4 Dea. & Chit. 461; *S. C.* 2 M. & A. 245.

H. & P., drawers of a bill on and accepted by *P. & Co.*, for 2000*l.*, indorse it to *A.* for his accommodation. *W. & Co.* discount it for *A.*, together with another bill drawn by *A.* for 2000*l.* upon and accepted by *S. & Co.* *A.*, and *H. & P.*, and *S. & Co.* severally become bankrupts. *W. & Co.* receive dividends from *S. & Co.*'s estate 666*l.* 13*s.* 4*d.* on *S. & Co.*'s acceptance; also 750*l.* from *H. & P.*'s estate on the bill drawn by them. They also prove against *A.*'s estate for 3333*l.* 6*s.* 8*d.*, as the amount of *H. & P.*'s bill, and balance of *A.*'s bill on *S. & Co.*, after deducting the 666*l.* 13*s.* 4*d.* received from *S. & Co.*, and receive 277*l.* 15*s.* 6½*d.* dividend thereon; 166*l.* 13*s.* 4*d.* being in respect of the proportion of proof on *H. & P.*'s bill. *P. & Co.* stopped payment, and under a composition deed *W. & Co.* receive 1000*l.* in respect of *H. & P.*'s bill of 1916*l.* 13*s.* 4*d.*; balance 83*l.* 6*s.* 8*d.* *Semble*, (*W. & Co.* claiming to have a right to retain *H. & P.*'s bill, in order to work out their remedies against *A.* in respect

of *A.*'s bill,) that the assignees of *H. & P.*, although they tendered the balance 83*l.* 6*s.* 8*d.*, could not compel *W. & Co.* to deliver up *H. & P.*'s bill. *Quære*, whether the Court has jurisdiction on a subject of litigated title such as this. Held, that as *W. & Co.* were not bound to receive the 83*l.* 6*s.* 8*d.*, the petition was premature at all events till the bill was fully paid off. *Ex parte Dickson, re Hutchinson*, 1835. 4 Dea. & Ch. 614.

TRADER AND TRADING.

See also BANKRUPT, WHO MAY BE.

Although no evidence of trading on proceedings, fiat will not be superseded if bankrupt admitted to petitioning creditor that he was a trader. *Ex parte* and *re Bailey*, 2 M. & A. 86.

Semble, coach proprietor, as such, is not a trader. *Re Walker*, 2 M. & A. 267.

B., who was indebted to *G.* in a sum exceeding 100*l.*, became a trader in Scotland, and after the discontinuance of his trade, but before the concerns of his trade were wound up, and being still indebted to *G.*, committed an act of bankruptcy:—Held, that he was liable to a sequestration as a notour bankrupt, upon debt, trading, and act of bankruptcy. *Baillie v. Grant*, 6 Bligh, 459.

Personal property may be transferred for a sufficient consideration, without writing, if the possession be also transferred; and a debtor may prefer one creditor to another, if the

debtor be not a trader; but if he be a trader he cannot prefer one creditor to another, unless he be pressed. A fraudulent delivery of goods by a trader will be of itself an act of bankruptcy. A delivery of goods to one to whom no debt was due would be such a fraudulent delivery; and the delivery would likewise be fraudulent, though a debt was due, if the transfer of the goods was made voluntarily, and in contemplation of bankruptcy. *Scott v. Thomas*, 6 C. & P. 611.

TRANSFER OF PETITION TO C. R.

Petition presented to the Lord Chancellor before 1 & 2 Will. 4. c. 56., must be transferred by the Lord Chancellor to the Court of Review, before that Court can hear it. *Re Stokes*, 1835. 4 Dea. & Chit. 578.

TRANSFER.

Personal property may be transferred for a sufficient consideration, without writing, if the possession be also transferred; and a debtor may prefer one creditor to another, if the debtor be not a trader; but if he be a trader he cannot prefer one creditor to another, unless he be pressed. A fraudulent delivery of goods by a trader will be of itself an act of bankruptcy. A delivery of goods to one to whom no debt was due would be such a fraudulent delivery; and the delivery would likewise be fraudulent, though a debt was due, if the transfer of the goods was made voluntarily,

and in contemplation of bankruptcy. *Scott v. Thomas*, 6 C. & P. 611.

TRUST.

See also DECLARATION OF TRUST.

By the rules of an insurance company, no person, except a director, was permitted to hold more than two shares in his own name; but no rule prevented a person from being beneficially entitled to more than two shares, by holding them in the name of another party. The petitioner, who was already the holder of two shares, having purchased two other shares, caused them to be entered in the name of the bankrupt in the company's books, with the knowledge of one of the directors and the actuary. The bankrupt signed a declaration of trust, that he held the shares as trustee for the petitioner, but no notice of the trust was taken in the books of the company; and he continued to receive the dividends on the shares, accounting for them from time to time to the petitioner, up to the period of his bankruptcy, when the shares were still standing in his name. Held, that the shares did not pass to his assignees, as being in his order and disposition at the time of his bankruptcy. *Ex parte Watkins, re Kidder*, 1834. 4 Dea. & Ch. 87; S. C. 1 M. & A. 689.

M. and *A.*, partners, were consignees of a West India estate, and in that character became creditors to the estate. By deed, long prior to the

bankruptcy, the estate was conveyed to trustees, *M.* being one of them, on trust, to apply the proceeds to certain purposes, one of which was to pay off the debt due to *M.* and *A.* *M.* and *A.* assign their debt to *S. & Co.* *M. & A.* become bankrupt; but, prior thereto, they receive ten hogsheads of sugar, which remain in the docks, earmarked in their name, at the time of the bankruptcy. Shortly after the bankruptcy, seventy-four hogsheads arrive, consigned by the bill of lading to the bankrupts, which are received by the assignees, who also take the other ten hogsheads. Held, that the sugars came to the hands of *M.* and *A.* clothed with trusts to pay the proceeds to *M.* as trustee, and were not in the reputed ownership of *M.* and *A.* but must be applied to pay off the debt assigned to *S. & Co.*, and in discharge of the other trusts of the deed; *M.* as trustee being affected with notice to *M.* and *A.* of the assignment of their debt. Held also, a case within the principle of *Ex parte Waring*, 19 Ves. 345. *Ex parte Smith, re Manning*, 1834. 4 Dea. & Ch. 579.

To assumpsit, by two plaintiffs, for goods sold, &c., defendant pleaded the bankruptcy of one. Replication, that, before the bankruptcy, the bankrupt plaintiff assigned to the other all his interest in the debt, and that the bankrupt now sued only as trustee for his co-plaintiff. The Court was of opinion that the replication was bad, for not stat-

ing that the debtor had had notice of the supposed assignment, although the defendant had pleaded over without alleging the want of notice. But the plaintiff had leave to amend. *Dean v. James*, 1 Ad. & El. 809.

TRUSTEES.

A bankrupt conveys his real estate to two trustees upon certain trusts for the payment of his debts, and subsequently enters into an agreement with them as to the sale of the property; after which he takes forcible possession of part of it, and the trustees bring an action of ejectment against him, which, with another action, is referred to the decision of an arbitrator. The award finds, that the creditors were entitled to recover in the action of ejectment; and directs that a sum of money which was due to the trustees for expenses incurred by them in the execution of the trusts shall be paid by instalments, and in default of payment, that the property shall be sold, and the proceeds applied in discharge of the debt due to the trustees:—Held, that the award was no charge upon the land; but that it did not destroy the lien thereon, which the deed had expressly given to the trustees for the expenses incurred by them in the execution of the trusts. *Ex parte Coppard, re Thornton*, 1833. 4 Dea. & Chit. 102.

Quære, if the C. R. has jurisdiction to entertain a petition seeking delivery up of specific chattel. It

has, if parties respondent consent to be bound. But the respondent being trustee cannot consent. *Ex parte Ellison*, 4 Dea. & Chit. 725.

Trustee, under deed of trust, by a former petition, upholding the trust and praying to annul fiat, and failing, but consenting to have the account against him taken on that petition by reference, ordered to pay costs of that petition, and to pay balance in his hands, under trust-deed, to assignees, with interest at 4l. per cent. from date of order of reference, although there was no evidence of interest having been made. Costs of reference to be paid by estate. *Ex parte Harding*, 4 Dea. & Ch. 793.

If mortgagee be himself the trustee to whom notice was requisite, the transaction is itself sufficient notice to prevent reputed ownership. *Ex parte Smart, re Holt*, 2 M. & A. 60.

TRUSTEE AND CESTUI QUE TRUST.

On the formation of a partnership between *A.* and *B.*, *A.* lends to *B.*, *B.*'s proportion of the capital, and *A.* is to receive it again, and interest thereon, out of *B.*'s share of the profits. *B.* assigns property to *C.* in trust to secure to *A.* the money lent by him, and covenants to pay *C.* the amount. After an act of bankruptcy by *B.*, known to *A.*, *A.* files a bill for a dissolution and account of partnership and for payment of the debt:—Held, that *A.* and *C.* could not, after such election, sue out a fiat against

B. founded on that debt, *A.* having elected his remedy and treated the debt as mixed up with the partnership accounts. *Scoble*, that a trustee alone cannot issue a fiat against the debtor, especially if the cestui que trust has by his conduct equitably precluded himself from acquiescing in such proceeding. *Ex parte Gray*, 4 Dea. & Chit. 778; *S. C.* 2 M. & A. 283.

Quære. Whether an act of bankruptcy, by denial of the debtor to the cestui que trust, is good to support a fiat, the trustee being the proper party to demand and receive the debt? *Per Sir G. Ross. Ex parte Gray*, 4 Dea. & Chit. 778; *S. C.* 2 M. & A. 283.

TRUSTEE, NEW APPOINTMENT.

A new trustee appointed, without a reference to the Registrar, on an affidavit of the fitness of the proposed trustee. *Ex parte Beveridge, re Hutton*, 1835. 4 Dea. & Chit. 455.

Where trustee becomes bankrupt, the general rule is, that the Court will not appoint a new one, under 6 Geo. 4. c. 16. s. 79., without a reference, unless all parties are before the Court. The smallness of the estate may form an exception. *Ex parte Whisk, re Sandys*, 2 M. & A. 214.

If trustee becomes bankrupt, Court will appoint new one without reference, on affidavit of solvency, fitness, &c. *Ex parte Walton, re Toulminson. Id.* 242.

TWENTY PER CENT. CLAUSE.

See ASSIGNEES, TWENTY PER CENT. CLAUSE.

UNCLAIMED DIVIDENDS.

So much of 6 *G.* 4. c. 16. s. 110. as directs filing certificate and investment of unclaimed dividends repealed, 5 & 6 *Will.* 4. c. 29. s. 5.

In future unclaimed dividends to be paid into bank to credit of Accountant-General in Bankruptcy. *Id.* s. 6.

How unclaimed dividends, &c. in hands of assignees, to be disposed of. *Id.* s. 7.

The interest made by the investment of unclaimed dividends does not belong to the general estate, but is divisible among the creditors claiming the hitherto unclaimed dividends. *Ex parte Renshaw, re Wild, 1834.* 4 *Dea. & Chit.* 483.

UNDERTAKING TO APPEAR.

A party is not entitled to an order on his petition, on the default of the respondent's appearance, if he is not prepared with an affidavit of the service of the petition, notwithstanding the respondent has given an undertaking to appear. *Ex parte Kirkaldy, re Holt, 1834.* 4 *Dea. & Chit.* 52.

USURY.

Although a fiat is fraudulently sued out, yet a creditor, whose debt is impeachable on the ground of usury, cannot petition to supersede it. *Ex parte Jarman, re Theed, 1835.* 4

Dea. & Chit. 393; *S. C.* 2 *M. & A.* 119.

VACATION.

Court will not issue attachment in the long vacation, unless there is fear of the party's absconding. *Ex parte Hunt, re Fox, 1834.* 4 *Dea. & Chit.* 503.

VACATING ASSIGNMENT.

In 1825 an assignment from provisional assignee to assignees, was prepared, but through neglect of solicitor never executed. The provisional assignment ordered to be vacated, and a new assignment executed by the Commissioners. It seems the 1 & 2 *Will.* 4. c. 56. s. 25. does not apply in such a case. The solicitor having been paid for the assignment, ordered to refund. *Ex parte Bennett, re Stephens, 2 M. & A.* 306.

VALUING ANNUITY.

See ANNUITY.

VARYING MINUTES.

The Court will not vary the minutes of a former order, which has been pronounced more than three months, except on a petition for rehearing. *Ex parte Wilson, re Butterworth, 1835.* 4 *Dea. & Chit.* 156.

Where a party wishes an essential alteration to be made in the judgment of the Court, as pronounced on a former hearing, he must not apply to amend the minutes of the order, but must petition for a rehearing. *Ex parte Soper, re Salter, 1835.* 4 *Dea. & Ch.* 275; *S. C.* 2 *M. & A.* 58.

VARYING ORDER.

Substantial variations in order cannot be effected by motion, but only on petition to re-hear. *Ex parte Soper, re Salter*, 1835. 4 Dea. & Chit. 569.

VENDOR AND PURCHASER.

A bankrupt having a mortgage term deposits the mortgage deed with a party by way of equitable mortgage, and afterwards purchases the equity of redemption: Held, that the whole of the bankrupt's interest in the property must be sold, and his assignees join in the conveyance to the purchaser. *Ex parte Tuffnell, re Watts*, 1834. 4 Dea. & Chit. 29; S. C. 1 M. & A. 620.

VEXATION.

Where the bankrupt vexatiously petitions to supersede for want of an act of bankruptcy, which he was evidently aware of having committed, the petition was dismissed with costs. *Ex parte and re Thompson*, 1834. 4 Dea. & Chit. 534.

VIVA VOCE EXAMINATION.

See EXAMINATION VIVA VOCE.

WAIVER.

A. and *B.*, partners, were solicitors to the commission. More than six years back they received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee

till within six years. Beyond the six years *A.* and *B.* (upon an agreement that *A.* should pay all the debts) dissolved partnership; and the assignee, with knowledge of this fact, continued to employ *A.* alone as the solicitor to the commission, and no attempt was made to charge *B.* with the monies received by *A.* and *B.* till very lately; viz., when an official assignee was appointed. Nor had *B.* ever acknowledged any liability to account:—Held, first, that as between *B.* and the creditors, neither the statute of limitations, nor laches, nor other conduct of the assignee, would operate as a bar, *A.* and *B.* being solicitors to the commission. But secondly, that as the assignee was able to recoup the estate, he could not, under such circumstances of conduct on his part, call on *B.* to account. *A.* had become bankrupt; *semble*, nevertheless, that he or his assignees were necessary parties. *Ex parte Gould, re Robertson*, 1834. 4 Dea. & Chit. 547.

Specific performance of sale under Lord Loughborough's Order decreed by this Court, although the following objections were urged: viz. 1st. That particulars of sale did not state that sale took place under order of Court; it appearing that purchaser must have known the fact that it was so. 2d. That a third mortgagee of equity of redemption and an assignee on prior insolvency of bankrupt, were not parties. 3d. Though the petitioning creditor's debt on which this

fiat was founded was contained in the schedule in prior insolvency; especially as the purchaser was presumed to have known of all the objections to the title, and was held to have waived them by granting a lease of the premises purchased by him before the title to him was completed. *Quere*, whether this Court has jurisdiction to direct specific performance of contract of purchase of bankrupt's property, where the purchaser did not know, and had no means of knowing, that the sale took place under order of this Court or of Commissioners? *Ex parte Sidebotham*, 4 Dea. & Chit. 693; *S. C.* 2 M. & A. 146.

WARRANT OF COMMITMENT.

Application for warrant of commitment for disobedience of a four-day order is *ex parte*, and quite of course. *Ex parte Hunt, re Fox*, 1834. 4 Dea. & Chit. 503.

The Court has a general jurisdiction to entertain questions on the legality of commitment by Commissioners upon petition without habeas corpus, and without the warrant of commitment being before it; especially where the objections to the committal would not appear on the face of the warrant. *Dubit*. Sir J. Cross, as to the production of the warrant. *Quere*, whether this Court has any jurisdiction to issue the writ of habeas corpus? *Ex parte and re Jones*, 1834. 4 Dea. & Chit. 536.

WIFE.

By will the father-in-law of the bankrupt gave 4000*l.* in trust for his daughter for life, to her separate use, then to the bankrupt for life, and then to the issue of the marriage. The will, reciting that the bankrupt was indebted to the testator 6000*l.* on bond, declared that so much of the debt on the bond as remained unpaid in the testator's life-time should go in redemption and satisfaction of the above bequest of 4000*l.* Prior to the bankruptcy, and subsequently, by means of dividends from his estate, 1069*l.*, part of the 6000*l.* bond debt, was paid off and invested in the funds. On petition of the assignees, claiming to be entitled to the interest of the 1069*l.*, the wife being dead—Held, (Sir J. Cross, *diss.*) that, until the 4000*l.* should be made up, the 1069*l.* should accumulate; after which the assignees were declared entitled to the interest for the bankrupt's life. *Ex parte Young, re Prior*, 1835. 4 Dea. & Chit. 645.

The Court has no jurisdiction to control the discretion of a Commissioner as to what documentary evidence he shall require to be produced to prove an act of bankruptcy. But the Court intimated its opinion that a letter written by the bankrupt's wife to a third party, in whose possession it remained, though it could not in any way afford direct evidence of the act of bankruptcy (unless it was also proved that she

was authorized by her husband to write it as his agent), she not being examinable as a witness upon that point, yet might be ordered to be produced, to be used only as a clue to the procurement of other evidence as to the act of bankruptcy. *Ex parte Groom, re Chambers*, 1835. 4 Dea. & Chit. 640.

WITNESS, COMPETENCY OF.

The drawer of a bill accepted by the bankrupt, but which he had indorsed over, and which was not yet proved against the estate, swore to a deposition in support of the fiat, stating himself therein not to be a creditor:—Held, in the face of that statement, that his deposition could not be rejected on the ground of his being a creditor. But being subsequently examined *vivâ voce*, and admitting the facts:—Held, that as he might be called on to pay the bill, and would have the option to prove against the estate, he was an interested party, and therefore not examinable. *Ex parte and re Lavender*, 1834. 4 Dea. & Chit. 487.

The Court has no jurisdiction to control the discretion of a Commissioner as to what documentary evidence he shall require to be produced to prove an act of bankruptcy. But the Court intimated its opinion that a letter written by the bankrupt's wife to a third party, in whose possession it remained, though it could not in any way afford direct evidence of the act of bankruptcy (unless it was also proved that she was authorized by her husband to write it as his agent), she not being examinable as a witness upon that point, yet might be ordered to be produced, to be used only as a clue to the procurement of other evidence as to the act of bankruptcy. *Ex parte Groom, re Chambers*, 1835. 4 Dea. & Chit. 640.

The declarations of a trader, made shortly after an absence, are not admissible to prove such absence an act of bankruptcy. *Semble*, that a breach of an appointment by a trader to call at his creditor's house to pay a debt, is not an act of bankruptcy. *Lees v. Marton*, 1 Moody & Rob. 210.

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